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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 et seq.), the Poultry Products Inspection Act (21 U.S.C. § 451 et seq.), and the Virus–Serum–Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D–578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

LIST OF DECISIONS REPORTED

MAY 1987

ANIMAL WELFARE ACT, (Cont.)

PACKERS AND STOCKYARDS ACT

Disciplinary Decisions:

PAGE

PAGE

AGRICULTURAL MARKETING AGREEMENT ACT, 1937

In re: WILEMAN BROS. & ELLIOTT, INC.

AMA Docket No. F&V 916-1.

Order filed May 6, 1987.

Brian Leighton, Fresno, California, for petitioner.

Gregory Cooper, for respondent.

Order by Donald A. Campbell, Judicial Officer.

ORDER DENYING INTERIM RELIEF

Petitioner's application for Interim Relief is denied. *In re Saulsbury Orchard & Almond Processing*, 46 Agric. Dec. __ (Apr. 1, 1987); *In re Borden, Inc.*, 44 Agric. Dec. ___ (Apr. 17, 1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. ___ (Dec. 18, 1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048, 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981).

In re: WILEMAN BROS. & ELLIOTT, INC.

AMA F&V 9126-1.

Order filed May 18, 1987.

Brian Leighton, Fresno, California, for petitioner.

Gregory Cooper, for respondent.

Order by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Petitioner's motion for reconsideration is denied since interim relief is not available irrespective of whether an enforcement action has been filed by the Department. *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983).

ANIMAL QUARANTINE ACT

In re: BILL CHASE AND GLASGOW LIVESTOCK AUCTION, INC.

A.Q. Docket No. 284.

Order filed May 29, 1987.

Lori Monfort, for Complainant.

Respondent, pro se.

Order by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion therefor, the Complaint filed herein on August 6, 1986, is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: MARIA LUISA PADILLA.

A.Q. Docket No. 201.

Order filed May 29, 1987.

Kevin Thiemann, for Complainant.

Respondent, pro se.

Order by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion therefor, the Complaint filed herein August 9, 1985, is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: WILLIAM L. DURIGG.

AWA Docket No. 397.

Order filed May 22, 1987.

Robert Ertman, for Complainant.

Respondent, pro se.

Order issued by Dorothea A. Baker, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case, stating that further proceedings are not necessary to effectuate the purposes of the Animal Welfare Act because respondent is no longer licensed as a dealer under the Act, and because the apparent size and nature of his business are such that he is not required to be licensed.

Accordingly, it is ordered that the complaint is this action be, and hereby is, dismissed, without prejudice.

In re: TIM AND LAMBERT HAUG d/b/a HAUG KENNELS.

AWA Docket No. 206.

Order filed May 20, 1987.

Robert Ertman, for Complainant.

Respondent, pro se.

Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case, stating that further proceedings are not necessary to effectuate the purposes of the Animal Welfare Act because respondents are no longer licensed as a dealer under the Act, and because they are not operating as a dealer.

Accordingly, it is ordered that the complaint in this action be, and hereby is, dismissed, without prejudice.

In re: DICK THIEMANN.

AWA Docket No. 306.

Order filed May 13, 1987.

Robert Ertman, for Complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

ORDER

Complainant has moved that the complaint be dismissed, without prejudice, stating that respondent has ceased operating as an exhibitor within the meaning of the Animal Welfare Act, and that further formal proceedings in this matter are not necessary to effectuate the purposes of the Animal Welfare act. Accordingly, it is ORDERED that the complaint in this action be, and hereby is, dismissed, without prejudice.

In re: JOSEPH A. WOLTERING, d/b/a BUCKEYE LLAMA RANCH.

AWA Docket No. 304.

Decision and order filed April 8, 1987.

Admission of transportation and sale of llamas without license—Respondent denies being a "dealer" or "exhibitor" as defined in the Act—Record shows "use or intended use" is the guideline for inclusion under the Act and regulations—Complaint dismissed.

Respondent admitted the transportation and sale of llamas without a license but denied these were violations of the Animal Welfare Act, that llamas are not an "animal" as defined in the Act, that respondent was not a "dealer" or "exhibitor" as defined by the Act, nor were the llamas transported "in commerce" as those terms are defined in the Act. Llamas found to be "animal" as defined by the Act and the regulations. Record shows that "use or intended use," i.e., sale for research, teaching, experimentation, exhibition, or as a pet, is the guideline for inclusion under the Act and regulations. Llamas sold at auction were raised by owner/breeder for profit, for show, for wool, and for training as pack animals. Such use here excluded them from coverage under the act and the regulations. Published regulations available to public do not require a dealer's license for "wholesaling at auction." Complainant dismissed.

Robert M. Frisby, for Complainant.

Stephen L. Black, Cincinnati, Ohio, for Respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, as amended, hereinafter referred to as the "Act," and the regulations and standards issued by the Secretary of Agriculture pursuant to the Act, 9 C.F.R. §§ 1.1 – 3.142. This proceeding was instituted by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, on July 23, 1984, alleging that respondent violated the Act (7 U.S.C. § 2134) and the regulations (9 C.F.R. § 2.1(a)).

Respondent's Answer, filed August 20, 1984, essentially questions the applicability of the statutes and regulations cited in the Complaint;

admitted respondent had never been licensed under the Act, and admitted the transportation and sale of six (6) llamas on or about October 24, 1982, and ten (10) llamas on or about October 23, 1983. Respondent denied these were violations of the Act, that llamas are not an "animal" as defined in the Act, that respondent is not a "dealer" or "exhibitor" as defined by the Act, nor did respondent transport the animals "in commerce" or engage "in commerce" as those terms are defined in the Act.

Oral hearing in this matter was held before the undersigned on December 17, 1986, in Cincinnati, Ohio. Complainant was represented by Robert M. Frisby, Esq., Office of the General Counsel, United States Department of Agriculture, and respondent was represented by Stephen L. Black, Esq. Leave was granted for the parties to file proposed corrections to the record by January 5, 1987 and briefs to be filed by complainant on or before January 26, 1987 and the respondent on or before February 20, 1987. However, because of delays in receiving the record transcript, these dates were extended to February 2, 1987 for proposed corrections to the record, briefs by the complainant extended to March 6, 1987 and by respondent to April 3, 1987. Such briefs have been received and have been considered in the Decision herein. For convenience, the applicable statutes and regulations are set forth in the Appendix hereto.

Findings

1. Joseph A. Woltering, hereinafter referred to as respondent, is an individual, doing business as Buckeye Llama Ranch at 3410 Morgan-Ross Road, Hamilton, Ohio 45013, and has never been licensed under the Act (Complaint, Para. 1, 2; Answer, Para. 2,3).

2. On April 22, 1980, the Regional Director-Western, Veterinary Services, Animal and Plant Health Inspection Service (AHIS), U.S. Department of Agriculture (USDA), issued an in-house memorandum to Area Veterinarians in Sacramento, California and Salem, Oregon concerning the licensing of owners of llama herds. His interpretation of the Act was that if llama herds were used only for food, fiber, or breeding purposes and the sales from such herds were used for these purposes, that such herd would not be required to be licensed under the Animal Welfare Act. If any animals from the herd were sold for research, testing, experimentation, or exhibition purposes, or as a pet, such herd would require a license as a dealer. (RX-1; Tr. 73) [1]

3. By letter dated April 21, 1983, a Veterinary Medical Officer, APHIS, forwarded application forms for licensing under the Animal Welfare Act to respondent advising "If or when you fill them out and

[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

return them to us, we will arrange for an inspection of your facility." (CX-9)

4. By letter dated May 25, 1983, the Area Veterinarian in Charge, Pickering, Ohio, APHIS, forwarded a copy of the regulations issued under the Animal Welfare Act to respondent's attorney. The veterinarian noted that llamas were exotic, but that the term exotic was not expressed in the Act or the regulations. He noted that the definition of "animal" in the regulations included "...any other warmblooded animal" and that llamas would fall into this category. (CX-10)

5. By an in-house memorandum issued June 10, 1985, the Assistant Director, Animal Health Programs, Veterinary Services, APHIS, informed Regional and Area Veterinarians and Animal Care Specialists in the Veterinary Services, APHIS, that the breeding, sale, and ownership of llamas was "...growing rapidly and becoming more common." The memorandum set forth the policy that:

> 1. Anyone exhibiting llamas for compensation should be licensed.
>
> 2. Anyone selling llamas for research or exhibition purposes or wholesaling llamas to the pet trade or auction sales should be licensed.

In further elaboration of licensing of llamas under the Act, he noted that use of llamas as pack animals for food or fiber purposes, or for improving breeding, management/production efficiency, or nutrition would not be cause for licensing. Further, that the retail sale of llamas as pets or for private collection would not be cause for licensing. (RX-1)

6. Respondent has raised llamas for the past 11 years on his farm which consists of 80 acres and is basically given over to the breeding and raising of llamas. It includes a lake, 4 llama barns, and 10-12 pastures on which the llamas graze. The farm also produces hay which is used to feed the llamas. Respondent raises llamas as an investment, and selectively breeds them for their wool content, which he sells, and as pack animals, which are trained by his son. He is a member of the "International Llama Association" (ILA), the "Llama Association of North America," and the "Mountain States Llama Association." He subscribes to llama industry magazines, such as the "3L Llama," "Llamas," and "The International Camelid Journal." Respondent sells llamas both by private treaty and at auctions. There are no llama auctions in the State of Ohio. (RX 2-5; Tr. 106-114, 122)

7. On or about October 24, 1982, respondent transported six (6) llamas from his farm in Hamilton, Ohio to the 5-H Ranch, Cape Girardeau, Missouri, and consigned them to the Auction for sale. The respondent admitted the transportation of 6 llamas to the auction and their sale at the 5-H auction in October, 1982, for which he received in excess of $500. However, there is no evidence in this record to show

the identity of the purchasers of these 6 llamas. (Complaint, Para. 3; Answer, Para. 4)

8. In October 1983, respondent transported 11 surplus llamas and one alpaca in commerce from his farm in Hamilton, Ohio to the 5-H Ranch Auction (5-H), Cape Giradeau, Missouri and consigned them to the auction for sale. Respondent did not know who purchased these animals, since buyers are only identified by number of settlement sheets provided to the consignor. (CX-2, RX-9; Tr. 106-113, 121-124)

9. Documents obtained from 5-H by a Compliance Officer, APHIS, USDA, show that respondent (Consignor No. 151) consigned 11 llamas and one alpaca to 5-H for auction on October 21, 1983. The total sales price he received as a result of these sales amounted to $19,725. (CX-2, RX-9)

10. Other documents obtained from 5-H show that one of respondent's female llamas was purchased by Buyer No. 75, subsequently identified as Bob Jones, Mechanicsville, Pennsylvania, for the sum of $4,000. Mr. Jones also purchased two other llamas from two different consignors, one for $5,000 and one for $4,000, both being female llamas. Robert E. Jones (Bob Jones) is president of Bob Jones Promotional Attractions, Inc., Mechanicsville, Pennsylvania. During the period here he held a class C license, No. 23E108, issued by the Animal and Plant Health Inspection Service, USDA. The nature of his business at the time was listed as "zoo" and presumably the Class C license was for its operation. A sworn affidavit executed by Mr. Jones, dated December 15, 1986, was received into the record, without objection. Mr. Jones declared he was the owner of Bob Jones Promotional Attractions, Inc., Mechanicsville, Pennsylvania, and that he was a licensed exhibitor of exotic animals. Further, he had purchased a brown and white female llama at the 5-H Ranch Auction, Cape Girardeau, Missouri, in October 1983, for $4,000. He purchased this llama for breeding purposes only since he runs a llama breeding operation which is separate from his animal exhibition business. The llama was not purchased for research, exhibition, teaching purposes, or as a pet. (CX-2, 3, 6; RX-11; Tr. 12-16)

11. Further records obtained from 5-H show that another female llama consigned by respondent to the auction was purchased by Buyer No. 68, subsequently identified as Sandy Haynes, Route 3, Box 100, Lambert, Mississippi, for the sum of $3,000. Sandy Haynes also purchased two additional female llamas ($3,250 and $3,000), as well as a male llama for $575.00. During the period involved here a Class B license, No. 65 B-7, had been issued to the partnership of "Fletcher and Barry Haynes," Route 3, Box 100 Lambert, Mississippi by the Veterinary Services, APHIS, USDA. The partnership is listed on the ap-

plication as a seller of "large and small hoofed animals." (CX-2, 4, 7; RX-4; Tr. 14-15, 19)

12. Additional records obtained from 5-H show that the male alpaca consigned by respondent to the auction was purchased by Buyer No. 190, subsequently identified as Marvin Paz, Harper, Texas, for the sum of $425. Mr. Paz also purchased a male llama owned by a different consignor for the sum of $325. During the period involved here Mr. Paz, operating as Paz Livestock, Inc., held a Class B license, No. 74AA446, issued by the Veterinary Services, APHIS, USDA. Mr. Paz's business was listed as a "breeder" and "auction." It is presumed that the license issued to Mr. Paz was as an operator of an auction. (CX-2, 5, 8; RX-4; Tr. 15-16)

13. Other than the records obtained from 5-H and the license applications, the Compliance Officer did not know the business in which each of the buyers was engaged.

14. Richard L. Crawford, D.V.M., Senior Staff Veterinarian, Animal Care, APHIS, USDA, has the responsibility of overseeing and supervising the enforcement of the Animal Welfare Act, and the regulations promulgated, and to draft pertinent regulations. Except for internal APHIS memoranda, no regulations pertaining to llamas has been published in a public record. He testified that basically the policy on llamas is that if they are used, or sold, for exhibit or research purposes, or sold wholesale as pets or through auctions, the seller/owner should be licensed. A license is not required if they are used as work animals, or as food or fiber animals or sold to retail pet stores. In his experience, llamas are exhibited in many zoos throughout the United States. This is evidenced by a newsletter published by the "American Association of Zoological Parks and Aquariums" (AAZPA) which lists the latest births of animals in zoos operated by municipal and county governments and other authorized zoos. In the two issues of AAZPA (August and November, 1986) entered into the record, a total of 7 llamas were reportedly born in five different zoos. This publication does not list the total number of llamas in each zoo. APHIS also maintains a register of licensees under the Animal Welfare Act. (CX-11, 12, RX-1; Tr. 43-46)

15. Dr. Crawford stated llamas are also exhibited in circuses and petting zoos as is evidenced in "The Circus Report," a monthly publication showing advertisements of trained animal shows which included llamas, as well as the sale of a complete petting zoo which also included llamas. Both the trained animal shows and the petting zoos included many other animals, i.e., lions, tigers, dogs, bears, horses and monkeys, along with the llamas. Submitted for the record was a portion of the October, 1986 issue of the "Animal Finders Guide" which carried a schedule of events of the 5-H Ranch Auction to be held October

18–19, 1986, at Cape Girardeau, Missouri. Included at a separate and specified time was the auction of llamas, alpacas, and guanacos and the comment that this auction could be the greatest llama sale ever held. A petting zoo, which also included llamas, was also advertised for sale. (CX–13, 14, 15; Tr. 46–50).

16. Dr. Crawford was not familiar with the entire llama population in the United States, only that it is growing. Nor was he aware that importation of llamas had been curtailed, except he knew some problems existed with their importation. He has only a general familiarity with llamas and their breeding in this country, has never attended a llama auction, and is not very familiar with llama organizations in this country. In order to carry out the intent of the Congress, and because larger numbers of llamas were becoming available, his service concentrated on their wholesaling rather than individual resale. An auction is considered the wholesaling of llamas. However, it was acknowledged by Dr. Crawford that the seller at an auction does not know who the buyer is going to be, but if an auction is attended by breeders and only breeders were its buyers, no license would be required. Other than issuing in–house memoranda to Veterinary Service personnel, informing them in training sessions, and presentations at meetings, his Service has not publicized recent changes in the interpretation of the Act and the regulations. He has not been in attendance at any of the aforementioned meetings, but believes his superiors have been to one or two of the meetings. Nor was he familiar with any of the llama industry magazine publications. However, it was acknowledge that they were magazines directed to breeders of llamas. (Tr. 61–63, 69–70, 77–78, 80, 84, 98)

17. Llamas are classified in the family of "camelids" which category also includes camels, vicuna, alpacas and guanacos. They are native to South America, more specifically in the Andean mountain areas of Bolivia and Peru where they are considered domesticated and are used as beasts of burden, for their wool, as well as their meat. (RX–2) In the late 1800's some llamas were imported into the United States for private collections and for display in zoos. Llamas may be classified as "exotic" in the United States only in the sense that it is an animal imported from another country and not naturally or historically, at least in past eras, found on farms or in the wildlife of the United States. (Tr. 63, 161–164; RX–10–12)

18. In the 1930's and early 1940's llamas were imported into the United States but during ensuing years restrictions were placed on their importation because they were susceptible to hoof and mouth disease. Since that time only a very limited number have been imported into the United States and then only under very strict and lengthy quarantine procedures. As a result, the increased number of llamas in this country, which has presently been estimated at between 12,000–14,000,

have come about through breeding of those already within the U.S. (Tr. 161–166)

19. During the past several decades there has been an increase in the number of breeders because of the high demand for llamas. Owner/breeder organizations, such as the "International Llama Association" (ILA) have been formed for the purpose of exchanging data concerning the breeding, raising and sale of llamas, as well as providing information as to their characteristics, care and feeding, habits and behavior, uses and training. (RX–3, RX–10) It also publishes a directory of breeder/owners. Other associations include the "Llama Association of North America" and the "Mountain States Llama Association." The ILA is probably the largest organization covering the United States and Canada. As of 1985 there were 565 members enrolled accounting for ownership of 7,828 llamas. The increase in breeder/owners and number of llamas is evident when compared with the year 1982, when there were 282 breeder/owners accounting for 3,231 llamas. (RX–1, 3; Tr. 108–109, 166)

20. Of 565 members of ILA, less than 30 were listed as breeder/pet establishments. The remainder were breeders who were involved in training llamas, offering llamas as pack animals, for wool uses, and for research. However, those listed as owner/breeders "research" (less than 60) do not conduct research in the ordinary sense of the word, i.e., biological laboratory experimentation. Rather, the "research" is by owners who conduct studies on characteristics, breeding, feeding habits, herd protection, grazing, size, weight and health of the llamas. They conduct the "research" for their own benefit to enhance breeding, and exchange this information with other owner/breeders. (RX–3; Tr. 135, 158) Other types of research are behavioral, communication studies, reproduction and blood analysis of live llamas all for the purpose of enhancing the breeding of llamas. (RX–2–3; Tr. 135, 153, 158, 159)

21. There are also industry magazines, such as the "3L Llama Magazine" and its successor, "Llamas," and "The International Camelid Journal," which list owner/breeder advertisements for the purchase and sale of llamas; reports on activities of breeder/owners; schedules of llama auctions; reports on the results of sales at these auctions, as well as awards given at auction sales for best of show in the various categories of llamas, i.e., appearance, size, wool cover. A number of state 4–H Clubs show llamas at state and county fairs along with other livestock. As with other livestock, members of the 4–H Clubs learn to raise, feed and care, and show llamas for prizes. (Tr. 169, 189) The "Drovers Journal," a weekly business publication of the cattle industry, now carries a separate section advertising the sale of llamas for breeding purposes. (RX–4, 5, 6, 8)

22. Auctions are held to create a market for llamas, for show, for standardizing llama characteristics, for first owners to purchase seed stock for later breeding, for owner/breeders to purchase llamas to enhance the quality of their herds, to enable owner/breeders to compare their stock with others and sell them efficiently, and provide an outlet for surplus llamas. Some are bred for their wool production which is a soft, fine wool that can be made into garments and blankets. It has been estimated that llama wool sells for $10-$12 per pound whereas sheep wool sells for $.30-$.40 per pound. (Tr. 115, 116, 127, 146-147, 167, 170, 189; RX-5)

23. Owner/breeders consign their llamas to the auction and later receive an accounting showing the prices for which the llamas were sold. Purchasers are identified on the consignment sheets by number only. (RX-9; Tr. 124, 187) Persons attending auctions purchase for investment and breeding. Seldom do attendees purchase as pets, for zoos, or exhibition in petting zoos because the prices resulting from competitive bidding at an auction are too high for such purposes. Established public zoos usually mate llamas themselves or purchase or trade for them with other such zoos. It is estimated that the total number of llamas in public zoos and exhibition petting zoos is between 500-1000, with the major portion accounted for by public zoos. (Tr. 167-168, 171-173)

24. The initial day of an auction is devoted to the showing of llamas and the awarding of champion ribbons for best in appearance, sex, wool coat and size. (Tr. 115-116) At the Fred Hartman Auction Sale held at Tecumseh, Nebraska in April 1985, a single female llama sold for $53,000, while another purchaser paid a total of $350,000 for 39 llamas. Excluding the $53,000 purchase, the average female llama sold for $9,650 (the Grand Champion female - $15,000). The Grand Champion male llama sold for $10,000. Gross sales from the auction totaled $800,000. In 1984, a total of 94 llamas sold for approximately $340,000 at a similar auction. Twice that amount was sold at a 1985 auction with over 100 purchased as show animals. (Tr. 114-115; RX-6)

25. At the Huff, Williams Auction Sale held at Salem, Oregon in July 1986, one purchaser paid $190,000 for five llamas. The highest price, $47,000, was paid for a female llama and the low price for the day, $7,500, was paid for a male llama. Gross sales of this auction amounted to over $660,000. (RX-5) Bloodlines, sires and dams of the llamas play an important part in the prices paid for llamas. (RX-7)

26. Llamas are bred and raised on farms and ranches by either full or part-time owner/breeders. They are selectively purchased for desirable characteristics, such as body size and wool coat, and introduced into a herd to enhance breeding. (RX-2; Tr. 175) They are raised by owner/breeders for investment and monetary gain. (Tr. 165) Llamas

in the United States are treated as any other line of livestock. (RX-2) The majority of the llamas are found in the west and northwest, particularly in the states of California, Nevada, Colorado, Oregon, Washington, Idaho, Montana, and Alaska, but are gradually moving eastward to such central and eastern states as Michigan, Illinois, Indiana, Ohio, Pennsylvania and even Florida, Vermont, New York and Virginia. (RX-3; Tr. 161-165, 169. 174)

27. The llamas long domestication and use as a beast of burden in South America have been rediscovered in the United States by hikers, hunters and forest work crews. They are easy to train and their hardiness and surefootedness make them excellent pack animals. Their agility allows them to negotiate terraln that would be difficult or impossible for traditional pack animals. Because of these characteristics some llamas are bred and trained as pack animals. They are usually male, small in size and are bred to eliminate their woolly coat. (RX-2, 10; Tr. 108, 148, 174)

Discussion and Conclusions

The basic question here is whether or not llamas are included in the term "animal" as that term is defined in the Act and the regulations and, if so, are they animals which require licensing by a person who deals in their purchase and sale. The Act (7 U.S.C. § 2132 (g)) defined the term "animal" by including specific animals, as well as a catch-all, "...or such warm-blooded animal." Of these animals, the Secretary is delegated the authority to set criteria to determine which animals are covered by the Act. The criteria set are whether animals are used, or intended for use, for research, testing, experimentation, or exhibit purposes, or as a pet. In such case a dealer is required to be licensed under the Act and the regulations. Excluded from these categories, as here pertinent, are horses not used for research purposes and other farm animals used or intended for use as food or fiber, or livestock used or intended for use for improving animal nutrition, breeding, management or production efficiency, or for improving the quality of food or fiber.

The regulations (9 C.F.R. § 1.1(n)) promulgated by the Secretary in accordance with the authority granted in the Act named specific animals to be covered by the Act and retained the catch-all "... or any other warm-blooded animal." However, the regulations added to this term "...which is domesticated or raised in captivity or which normally can be found in the wild state." This is followed by the same phraseology as the Act, i.e., used or intended for use for research, testing, experimentation or exhibit purposes or as a pet. The regulation also elaborates on the exclusions by specifically excluding horses or other farm animals, and livestock used or intended for use for improving animal nutrition, breeding, management/production efficiency, or for improving the quality of food or fiber. Added to the regulations was a

definition of "farm animal" wherein it also included the catch-all "any warm-blooded animal normally raised on farms in the United States and used or intended for use as food or fiber." (9 C.F.R. § 1.1(o)).

The purpose of the change in the definition of "animal" in the regulations in 1971 was made because it was intended "...that all warm-blooded animals normally found in the wild, regardless of whether they were captured in the wild, raised in captivity or were domesticated in some foreign country and considered as a domestic animal in that country, would be covered..." 36 FR 2418-19, December 24, 1971. Thus, there is no question that llamas are included in the term "animal," as that term is defined in the Act and the published regulations.

Whether a person who raises, buys or sells llamas is required to be licensed under the Act and the regulations is also based on their "use or intended use." This has been a long standing APHIS policy, emphasized in the several memoranda and letters of record issued by the Veterinary Services, APHIS, USDA, commencing in April 1980 (RX-1). The line of demarcation expressed in these letters and memoranda is "use or intended use." If the owners of the llamas raised them for food, fiber, or breeding purposes, or sold them for these purposes, no dealer license is required. On the other hand if they were used or intended for use, or sold for research, testing, experimentation, exhibition, or as a pet, the owner would require a dealer's license under the Act and the regulations. The evidence of record is very sparse and lacking to show that respondent was in the latter category. On the other hand respondent's evidence is substantial and very convincing to show that llamas are raised for investment, for breeding, for wool content, and for training as pack animals, all of which are excluded from coverage under the Act and published regulations.

Complainant's Exhibit No. 9, dated April 23, 1983, was a letter forwarding to the respondent application forms to apply for a dealer's license under the Animal Welfare Act. Admittedly, this was subsequent to a Compliance Officer's visit to respondent's farm in March, 1983. Nevertheless, the letter merely states "If or when you fill them out...," which connotes a nebulous status rather than a warning. The Veterinary Services letter of May 23, 1983 (CX-10) is definitely an answer to an inquiry by respondent's attorney. Essentially it advised that llamas were included in the term "animal" as that term is defined in the Act and the regulations, and enclosed copies of the pertinent sections of the regulations. Neither the regulations cited, nor the author's comments on these regulations give any indication that a person wholesaling llamas at an auction was required to obtain a dealer's license. Although the author of the letter made a judgment that respondent was required to be licensed under the Act and the regulations, there still was a judgment to be made by the attorney represent-

ing respondent. Evidently her legal advice to the respondent was that he was not required to be licensed. If anything, the inquiry by the attorney shows respondent's effort to determine whether the Act and regulations required him to be licensed by seeking professional legal advice.

The Veterinary Services memorandum of June 10, 1985, was an in-house memorandum. (RX-1) However, there is no indication in this record that the interpretations of the Act and the regulations were disseminated to the public, except that Dr. Crawford testified that his supervisors may have disseminated the policy change at one or two meetings, the nature of which, and the attendance of which, are unknown. The in-house memorandum was issued to the Veterinary Services Staff because "The breeding, sale, and ownership of llamas are growing rapidly and becoming more common." Because of this, the APHIS policy was modified, i.e., anyone exhibiting llamas for compensation, or selling for research or exhibition purposes or *wholesaling* for the pet trade or *at auction* should be licensed. Excluded from licensing were owner/breeders of llamas used as pack animals for food and fiber purposes, or for improving breeding, management/production efficiency, or nutrition, or retail pet sales or private collection.

It has been substantially shown in this record that the llamas sold at auction fell within this category of exclusions. This in-house APHIS memorandum was the first time that owners/breeders wholesaling llamas at auction were included in the category requiring a dealer's license and then only in an in-house APHIS memoranda. There is no indication in this record to show respondent to be an operator of an auction although he did sell at auction. Rather, the record does show he was an owner/breeder, and trainer of llamas and sold their wool. Complainant presented as a witness a Compliance Officer, APHIS, whose testimony was restricted to obtaining pertinent records from the 5-H Ranch. These records reflect the sale, at auction, of 3 of respondent's 12 animals to three different licensed dealers. The inference espoused by complainant to reach the "use, intended use" test is that the purchasers were licensed dealers, therefore, the respondent should also have been licensed. Such is a *non sequitur*.

Relegating complainant's proof to these three instances, we find that one of the dealers, Bob Jones, operates two separate businesses, one as a breeder of llamas, and the other as an exhibitor of animals His sworn affidavit, admitted into the record without objection, states his purchase of the llama was for breeding purposes. Such admission without objection negates any argument that opportunity for cross examination was not available to complainant. Thus, in this instance there is no showing that the sale/purchase was for one of the covered purposes of the Act and the regulations.

The second instance was the purchase of a llama by Sandy Haynes, not further identified. The inference urged here is that because her address was the same as that of the licensed partnership of "Fletcher and Barry Haynes," that her purchase was as an agent for the partnership. The opposite inference could also apply, i.e., the purchases were for her own account. However, even accepting the inference of agency, the partnership application for a dealer's license shows that its business was selling large and small hoofed animals. The record does not show "the use or intended use" of the purchased llama or the "large and small hoofed animals," i.e., that they were used or intended for use for research, experimentation, exhibition or as a pet.

The third instance is the purchase at the auction of respondent's alpaca by Marvin Paz, a licensed dealer. Mr. Paz's application for a dealer's license shows that his business was that of "breeder" and "auction." It is noted here that an operator of an auction requires a dealer's license under the regulations (9 C.F.R. 2.1(a)). In fact this is the only section dealing with licensing where the word auction is used. Thus, in all three instances, the "use or intended use" test to include llamas has not been met by complainant.

Other proof submitted by complainant consists of excerpts from newsletters and magazines which list births of llamas at public zoos, and advertise trained animal shows and petting zoos. Llamas are listed among the many different animals included in these shows and petting zoos. The inference urged here is that llamas purchased at auction are used for these exhibition purposes. Testimony of complainant's witnesses show they had never attended a llama auction and were not familiar with them. However, as Dr. Crawford acknowledged, a seller at an auction does not know who the buyer is going to be. But if an auction is attended by breeders, and only breeders were the buyers, no license would be required. There is no showing in this record that the buyers were other than breeders. It has been shown that public zoos usually mate their own llamas, or trade with other zoos. Further, that the price resulting from high competitive bidding at auction would be prohibitive to owners of animal shows or petting zoos, whereas purchase by private treaty would be more economical for them. As noted in the Findings, it was estimated that of the 12,000–14,000 llamas in the United States today, approximately 500–1000 are owned by public zoos, animal shows and petting zoos, with the majority of this number being accounted for by public zoos. This is hardly a basis for the conclusion that the majority of llamas in the United States are regularly used for these purposes.

The above magazines and newsletters appear to be the only source of information with which complainant's witnesses were familiar to show that llamas were used in exhibitions and petting zoos. Complainant's

witnesses had not attended a llama auction, were not familiar with the llama industry associations, or of llama trade magazines which emphasize the breeding, purchase, sale, care and training of llamas.

On the other hand, respondent, through expert testimony and documentary evidence, has overwhelmingly shown that owners engage in breeding of llamas for investment; that there is a ready market for show and work llamas just as there is for livestock; that the majority of llama owners breed llamas for show, for their wool coat and, because of their unique characteristics, as pack animals; that llama auctions provide an outlet for owners to dispose of surplus llamas, to compare llamas and prices. At the same time the auction provides already established owners and new entrants an opportunity to purchase llamas for enhancement of their herd, or to obtain seed stock.

From the evidence of record it can only be said that the llama is an "animal" as defined by the Act and the regulations. However, it has not been shown that the llamas sold at auction were for the "use or intended use" covered by the Act and the regulations, i.e., for research, teaching, experimentation, exhibition purposes, or as a pet. Rather, it has been shown that owner/breeders raise llamas for profit, for show, for wool and for training as pack animals, which categories exclude them from coverage under the Act and the regulations. As recognized by the Veterinary Services, APHIS, USDA, the number of llamas in the United States is increasing and they are becoming "more common." Since this has been shown in the record and because of their characteristics and uses, and being "normally" bred and raised on farms as other livestock, it may well be that they should be classified as "farm animal."

Finally, prior to the Veterinary Services, APHIS, USDA, in-house memorandum modifying its policy, dated June 10, 1985, "wholesaling at auction" was not included in any document of record, or in published regulations. Thus, neither previous policy nor published regulations set forth this category as requiring a dealer's license. In other words, it was not made known in any publications issued to the public. In the opinion of the undersigned, the then existing policy was modified with the addition of "wholesaling at auction." Such a modification pursuant to delegated statutory authority is a substantive change which requires a change in the regulations and notification to the public in the form of publication in the Federal Register. (See *W.C. v. Bowen*, 64 ADL 2d 387 (CA9 - January 1987). This was not done here. Additionally, the policy change of "wholesaling at auction" was only first made known in the in-house memorandum to the Veterinary Services, APHIS, USDA, in June 1985, whereas the allegations set forth in the complaint took place in October 1982 and October 1983, over two and a half years and over a year and half, respectively, prior to this change in policy.

For all of the above reasons, I find that respondent was not required to be licensed as a dealer under the Act and the regulations and that the complaint in this matter should be dismissed.

Order

IT IS ORDERED, that the complaint in this matter, filed by the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, on July 23, 1984, be, and hereby is, dismissed.

[This decision and order became final May 22, 1987.—Editor.]

APPENDIX

Applicable Statutes

It is unlawful to act as a dealer without a license issued by the Secretary, who is authorized to assess a civil penalty of $1,000 for each violation. Specifically, the Act provides:

7 U.S.C. § 2132(f)

The term "dealer" means any persons who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include —

(i) a retail pet store except such store which sells any animal to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year.

7 U.S.C. § 2132(g)

The term "animal" means any live or dead dog, cat, monkey (nonhuman primate, mammal) guinea pig, hamster, rabbit, or such warm-blooded animal, as the Secretary may determine is being used, or intended for use, for research, testing, experimentation, or exhibit purposes, or as a pet, but such term excludes horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security or breeding purposes;

7 U.S.C. § 2132(h)

The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce on the intended dis-

tribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in state and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

7 U.S.C. § 2134

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

7 U.S.C. § 2149(b)

(b) Civil penalties for violations of any section,---:

Any dealer-----that violates any provision of this chapter, or any rule, regulation or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $1,000 for each violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense....The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary.

Applicable Regulations

9 C.F.R § 1.1(n)

"Animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or any other warmblooded animal, which is domesticated or raised in captivity or which normally can be found in the wild state, and is being used, or intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet. Such term excludes birds, rats, mice and horses and other farm animals, such as but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock, or intended for use as food or fiber, or livestock, or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs, including those used for hunting, security, or breeding purposes.

9 C.F.R. § 1.1(o)

"Farm animal" means any warmblooded animal (other than a dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, or rabbit normally raised on farms in the United States and used or intended for use as food or fiber.

9 C.F.R. § 1.1(f)

"Dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibitions, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include: (i) A retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or (ii) Any person who does not sell or negotiate the purchase or sale of any wild animal, dog or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year.

9 C.F.R. § 1.1(w)

"Exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary in specific instances, and such term includes carnivals, circuses, animal acts, and zoos exhibiting such animals whether operated for profit or not; but such term excludes pet stores, organizations sponsoring and all persons participating in state and county fairs, livestock shows, rodeos, purebred dog or cat shows and any other fairs intended to advance agricultural arts and sciences, as may be determined by the Secretary in specific instances.

9 C.F.R. § 2.1(a)

Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale (where any dogs or cats are sold affecting commerce), except persons who are exempted from the licensing requirements under section 3 of the Act, shall apply for a license on a form which will be furnished, upon request, by the veterinarian in charge in the state in which such person operates or intends to operate. If such person operates in more than one state, he shall apply in the state in which he has his principle place of business. The completed application shall be filed with such Veterinarian In Charge.

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS

In re: BRITTON BROS., INC.

P&S Docket No. 6631.

Ruling filed May 7, 1987.

The Judicial Officer ruled on a certified question by Judge Weber that complainant has shown "good cause" for amending the pleadings, after a settlement agreement had been reached as to all issues except the effective date of the suspension order.

Allan Kahan, for Complainant.

Bruce Keithly, Snohomish, Washington, for Respondent.

Ruling by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On May 1, 1987, Administrative Law Judge William J. Weber certified to the Judicial Officer the question as to whether complainant has shown "good cause" for amending the pleadings, after a settlement agreement had been reached as to all issues except the effective date of the suspension order. The effective date of a suspension order is a very important matter. Complainant's attorney states that he orally informed Ms. Roberta Britton that complainant would not agree to a suspension commencing later than January 18, 1987, and respondent does not deny that statement. Respondent did not agree to a suspension order prior to January 18, 1987, and, therefore, there is just cause for complainant not to continue with the settlement agreement. In addition, for the reasons set forth in complainant's status report, good cause exists for amending the complaint.

In re: JENNINGS SALES COMPANY, INC., AND WAYNE L. JENNINGS.

P&S Docket No. 6792.

Decision and order filed April 13, 1987.

Market agency—Dealer—Engaging in business while current liabilities exceed current assets—Failing to deposit into and properly maintain custodial account—Issuing insufficient funds checks—Failing to pay and failing to pay when due—Suspension of registration—Default.

Sharlene Lassiter, for Complainant.

Respondents, pro se.

Decision issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the financial condition of the respondents does not meet the requirements of the Act and that the respondents wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Jennings Sales Company, Inc., hereinafter referred to as respondent Jennings Sales, is a corporation organized and existing under the laws of the State of Illinois. Its business mailing address is West Jackson Street Road, Macomb, Illinois 61455.

(b) Respondent Jennings Sales at all times material herein was:

1. Engaged in the business of conducting and operating the Jennings Sales Company, Inc., stockyard, a posted stockyard under the Act;

2. Engaged in the business of selling livestock in commerce on a commission basis, and

3. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

(c) Wayne L. Jennings, hereinafter referred to as respondent Jennings, is an individual whose mailing address is 1542 West Jackson Street Road, Macomb, Illinois 61455.

(d) Respondent Jennings is, and at all times material herein was:

1. Engaged in the business of buying and selling livestock in commerce on his own account;

2. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce; and

3. The principal owner and person responsible for the direction, management and control of respondent Jennings Sales.

2. (a) As of August 31, 1985, respondent Jennings Sales' current liabilities exceeded its current assets. As of that date, respondent Jennings Sales' had current liabilities totaling $31,401.62 and current assets totaling $22,178.35, resulting in an excess of current liabilities over current assets of $9,223.27.

(b) As of September 19, 1985, respondent Jennings Sales' current liabilities exceeded its current assets. As of that date, respondent Jennings Sales had current liabilities totaling $47,076.82 and current assets totaling $39,333.84, resulting in an excess of current liabilities over current assets of $7,742.98.

(c) During the period August 31, 1985, through September 19, 1985, respondent Jennings Sales, under the direction, management and control of respondent Jennings, engaged in the business of a market agency selling livestock in commerce an a commission basis, notwithstanding the fact that its current liabilities exceeded its current assets.

3. (a) As of March 31, 1985, respondent Jennings' current liabilities exceeded his current assets. As of that date, respondent Jennings had current liabilities totaling $147,980.85 and current assets totaling $84, 457.50, resulting in an excess of current liabilities over current assets of $63,523.35.

(b) As of September 24, 1985, respondent Jennings' current liabilities exceeded his current assets. As of that date, respondent Jennings had current liabilities totaling $745,580.32 and current assets totaling $62,367.38, resulting in an excess of current liabilities over current assets of $683,212.94.

(c) During the period March 31, 1985, through September 24, 1985, respondent Jennings engaged in the business of a dealer, buying and selling livestock on his own account, notwithstanding the fact that his current liabilities exceeded his current assets.

4. Respondent Jennings Sales, under the direction, management and control of respondent Jennings, during the period June 29, 1985, through September 19, 1985, failed to maintain and use its Custodial Account for Shippers' Proceeds, hereinafter referred to as the custodial account, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due the consignors of livestock, in that:

(a) As of June 29, 1985, respondent Jennings Sales had outstanding checks drawn on its custodial account in the amount of $13,484.80, and had to offset such checks against a balance in the custodial account of $1,209.77, resulting in a shortage of $12,275.03.

(b) As of September 19, 1985, respondent Jennings Sales had outstanding checks drawn an its custodial account in the amount of $40,305.28 and had to offset such checks against a balance in the custodial account of $882.40, resulting in a shortage of $39,422.88.

(c) Such shortages were due, in part, to the failure of respondent Jennings Sales to deposit in its custodial account, within the time prescribed by the regulation, an amount equal to the proceeds receivable from the sale of consigned livestock.

5. The respondent Jennings Sales, under the direction, management and control of respondent Jennings, engaged in an unfair and deceptive practice in that on May 7, 1985, respondent Jennings Sales withdrew $55,000.00 from its custodial account and deposited the same into the dealer account of respondent Jennings, and did not use the same to pay shippers for livestock sold.

6. (a) Respondent Jennings Sales, under the direction, management and control of respondent Jennings, during the period August 15, 1985, through September 15, 1985, issued checks in excess of $7,300.00 in purported payment of the net proceeds due from the sale of consigned livestock which were returned unpaid by the bank upon which they were drawn because respondent Jennings Sales did not have and maintain sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented. A tabulation of these checks is set forth in paragraph VI(a) of the complaint.

(b) In connection with the transactions referred to in paragraph VI(a) of the complaint, respondent Jennings Sales, under the direction, management and control of respondent Jennings, failed to remit, when due, the full amount of the proceeds from the sale of consigned livestock.

(c) As of January 30, 1986 there remained unpaid a total of $5,086.39 for such livestock purchases.

7. (a) Respondent Jennings, during the period August 15, 1985, through September 15, 1985, issued checks in excess of $52,000.00 in purported payment of the purchase of livestock, which were returned unpaid by the bank upon which they were drawn because respondent Jennings did not have and maintain sufficient funds on deposit and available in the account on which such checks were drawn to pay such checks when presented. A tabulation of these checks is set forth in paragraph VII(a) of the complaint.

(b) In connection with the transactions referred to in paragraph VII(a) of the complaint, respondent Jennings purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of January 30, 1986 there remained unpaid a total of $11,980.00 for such livestock purchases.

Conclusions

By reason of the facts found in Findings of Fact 2 and 3 herein, respondent Jennings Sales' and respondent Jennings' financial condition does not meet the requirements of the Act and said respondents

have wilfully violated section 312(a) of the Act. (7 U.S.C. §§ 204, 213 (a)).

By reason of the facts found in Findings of Fact 4 and 5 herein, respondent Jennings Sales and Jennings have wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201. 42).

By reason of the facts found in Finding of Fact 6 herein, respondents Jennings Sales and Jennings have wilfully violated sections 307 and 312 (a) of the Act (7 U.S.C. §§ 208, 213(a)), and section 201.43(a) of the regulations (9 C.F.R. § 201.43(a)).

By reason of the facts found in Finding of Fact 7 herein, respondent Jennings has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondents Jennings Sales, and Wayne L. Jennings, their officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Jennings, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business subject to the Act while their current liabilities exceed their current assets;

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed in Section 201.42 of the regulations (9 C.F.R. 201.42) amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

3. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 C.F.R. 201.42);

4. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

5. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock;

6. Issuing checks to consignors and owners of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks when presented;

7. Failing to remit to owners and consignors of livestock, when due, the net proceeds derived from the sale of livestock;

8. Failing to pay, when due, for livestock purchases;

9. Failing to pay for livestock purchases; and

10. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented.

Individually, respondent Jennings, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay for livestock purchases.

Respondent Jennings Sales Company, Inc. and respondent Wayne L. Jennings are suspended as registrants under the Act for a period of five (5) years provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 60 days upon demonstration of solvency, that the shortage in their Custodial Account for Shippers' Proceeds has been eliminated and that payment in full to all livestock consignors and for all livestock purchases has been made, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent Jennings' salaried employment by another registrant after the expiration of the 60 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final May 26, 1987.—Editor.]

In re: HERBERT MERGEN.

P&S Docket No. 6861.

Order filed May 26, 1987.

Order issued by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On May 1, 1987, an order was issued in the above-captioned matter which, *inter alia,* suspended respondent as a registrant under the Act until such time as he complied fully with the bonding requirements under the Act and the regulations.

Complainant has not received information that respondent is in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued May 1, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: ORANGE MEAT PACKING, CO., INC., AND G. & L. PACKING CO., INC.

P&S Docket No. 5717.

Order filed May 29, 1987.

Order issued by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant now moves to dismiss respondent G. & L. Packing Co., Inc., as a co-party respondent in the captioned matter based on evidence which complainant has received.

IT SHOULD BE AND HEREBY IS ORDERED that the complaint is dismissed without prejudice, insofar as it pertains to G. & L. Packing Co., Inc.

In re: JEFF PALMER.

P. & S. Docket No. 6640.

Order filed May 14, 1987.

Order issued by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On June 23, 1986, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of ten years, providing that a supplemental order would be issued terminating the suspension at any time after the expiration of 120 days upon demonstration by respondent that all livestock sellers had been paid in full.

The order become final on November 3, 1986, and the suspension period commenced on that date. The 120 day period of suspension has expired and respondent has demonstrated that all livestock sellers have been paid in full.

Accordingly, IT IS HEREBY ORDERED that the suspension provision of the order issued June 23, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: ROBERT E. PARCHMAN, VIRGIL R. (RAY) LEMONS, AND JACK E. HAMILTON.

P. & S. Docket No. 6602.

Decision and order filed May 28, 1987.

Weighing livestock at other than true weights—Paying sellers and collecting from purchasers based of false weights—Failing to maintain and operate livestock scales as to insure accurate weights—Making false entries in scale tickets, invoices or other documents—Issuing invoices or other documents which fail to show true weights of livestock—Ordered to keep and maintain accurate accounts and records—Suspension of registration—Civil penalty.

The Judicial Officer affirmed Judge McGrail's order requiring respondents to cease and desist from several practices, including weighing livestock at other than their true and correct weights. The order suspends respondents as registrants for 90 days and assesses a $10,000 civil penalty. Although record-keeping violations are also involved, the suspension order is based on only the weighing violations because the violations are interlwined. Although willfulness is not an issue since respondents received a prior warning letter, willfulness includes acts with careless disregard of statutory requirements. The ALJ's citation of 7 U.S.C. § 205, rather than 7 U.S.C. § 204, as the authority for suspension is harmless error. Although respondent receive $7 per head regardless of weight, auction markets have innate reasons to short weigh. Each animal short weighed was short weighed separately and, therefore, each instance of short weighing an animal is a separate violation. The sanction in this case is appropriate. Department's severe sanction policy explained. Although the suspension order will close respondent's auction market at another location not involved in the violations, that fact was considered in suspending respondents for only 90 days.

Edward Silverstein, for Complainant.

Daniel W. Olsen, Kansas City, Missouri, for Respondent.

Initial decision and order by Edward H. McGrail, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on June 11, 1986, by Administrative Law Judge Edward H. McGrail (ALJ) ordering respondents to cease and desist from several practices including "[w]eighing livestock at other than their true and correct weights," and "[p]aying the sellers of livestock on the basis of false and incorrect weights. . . ." The order also suspends respondents as registrants under the Act for 90 days and assesses a $10,000 civil penalty.

On July 21, 1986, respondents appealed to, and requested oral hearing of, the Judicial Officer, to whom final administrative authority has

* *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Cum. Supp.) and Carter, *Packers and Stockyards Act*, in 10 Hart, Agricultural Law, ch. 71 (1980).

been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** The case was referred to the Judicial Officer for decision on July 31, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented ("Act"), 7 U.S.C. § 181 *et seq.*, the regulations issued pursuant to the Act, 9 C.F.R. § 201.1 *et seq.*, and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, 7 C.F.R. § 1.130 *et seq.* ("Rules of Practice").

The proceeding was instituted by a Complaint filed on September 20, 1985, by the Acting Administrator, Packers and Stockyards Administration. It was alleged in the Complaint that Robert E. Parchman, Virgil R. (Ray) Lemons, and Jack E. Hamilton, who were partners doing business as Cumberland City Stockyard (collectively referred to as "respondents"), violated the Act and the regulations, on

May 18, 1985, *** in the following ways: (1) weighed consigned livestock at less than their true weight; (2) issued scale tickets and accounts of sale to the consignors of such livestock on the basis of false weights; (3) paid the consignors of such livestock on the basis of false weights; (4) issued buyer invoices and scale tickets to the purchasers of such livestock on the basis of false weights; (5) collected the purchase prices from the purchasers of the livestock on the basis of the false weights; and (6) issued scale tickets which failed to show the time of balance, or the address of the market, and which were not initialed by the weighmaster.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

On October 28, 1985, respondents filed an Answer in which they denied violating the Act and the regulations as alleged in the Complaint.

The hearing was held on February 26, 1986, in Nashville, Tennessee, before the undersigned. Complainant was represented at the hearing by Edward M. Silverstein, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250-1400. Respondent was represented at the hearing by Daniel W. Olsen, Esq., Van Hooser, Olsen and Parkinson, 9233 Ward Parkway, Kansas City, Missouri 64114. At the conclusion of the hearing, the parties were afforded opportunity to file briefs. Such have been filed by the parties with a final reply brief being filed by complainant on May 15, 1986. For ease of reference, relevant statutory and regulatory provisions are attached as Appendices A and B, respectively.

Discussion and Conclusions

The record in this matter shows that on two separate occasions official investigations were made into the weighing practices of respondents. On both occasions, August 11, 1984, and May 18, 1985, the check weighing was conducted, and the practices of respondents were investigated, by trained employees with many years of experience in the testing, operation and application of heavy duty scales for the weighing of livestock, including the scale utilized by respondents. This scale has been identified as a Howe weighbeam scale equipped with a Spinks indicator which measures in 5-pound increments, and is similar to the scale depicted on complainant's exhibit 1. This type scale allows for a maximum deviation, plus or minus 2 pounds, from the true weight of an animal.

The purpose of a check-weighing investigation is not to determine the accuracy of the scale but to determine whether the scale is operating properly and whether the weighmaster is performing his function

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*** While the complaint also sought sanctions for the violations of August 11, 1984, the Complainant's Proposed Findings of Fact, Conclusion and Order (April 11, 1986) sought sanctions only for the May 18, 1985, violations.

Additionally, although there is much evidence in the record of respondents' recordkeeping violations, "[f]alse weights always involve recordkeeping violations, in additional to trade practice violations, but since the violations are intertwined, any suspension order is based on the trade practice violations only. *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515 (1974), *aff'd mem.*, 510 F.2d 966 (4th Cir. 1975)." (Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 272 (1981 and 1986 Cum. Supp.)). Thus, recordkeeping violations are considered lesser included offenses, and will not be specifically addressed herein, even though raised in respondents' Appeal Brief, § V (July 21, 1986). However, insofar as respondents must refrain from any recordkeeping violations in any future operations, the order herein will contain instructions requiring respondents to cease and desist from such recordkeeping violations.

properly and in accordance with the regulations. Thus, a scale may not be accurate, but if operating properly, i.e., not binding and returning to zero balance, it will register the same weight, or less, for the same animal if that animal is weighed a second time within a reasonable period. Any error on the first weighing would be repeated on the second weighing. Where neither feed nor water is available to the penned cattle, they would record a lesser weight on the second weighing due to the shrink factor. For an animal to gain weight under these conditions is virtually impossible.

On the first check-weighing investigation on August 11, 1984, it was found that 11 of 16 cattle reweighed increased in weights ranging from 5 pounds to 15 pounds. In only two instances were the variations at 5 pounds. Thus, this investigation produced 9 instances in which cattle were weighed at less than their true and correct weights. Other violations were also noted, i.e., the weighmaster had not initialed nor recorded the time of scale balance on the scale tickets, and the scale tickets did not show the address of the market. These violations were subsequently brought to the attention of, and discussed with, respondents. A "warning letter" was issued to respondents by the Packers and Stockyards Administration, dated August 21, 1984, listing the violations found and requesting respondents to advise what remedies were taken to correct their weighing practices. Respondents were also warned that if similar violations were found in the future, more formal action would be taken. This letter was acknowledged by Respondent Parchman, as "partner", who pledged future compliance. Thus, at this time, the violations were discussed, procedures and regulations for conducting the proper weighing of livestock were highlighted, and respondents acknowledged not only the violations but also that they were cognizant of the regulations relating to the proper weighing of livestock.

The second check-weighing investigation of respondents' practices occurred on May 18, 1985. On that occasion, 21 head of cattle were reweighed. The last animal weighed by Respondent Lemons prior to the check weighing (#549) was weighed in view of the investigators and was the first animal reweighed during the check weighing. The reweighing recorded a 5-pound increase. This 5-pound increase was not unusual since the break in the scale indicator could have been read at either 900 pounds or 905 pounds. However, reweighing of the 20 other head of cattle taken from pens showed increased weights ranging from 20 pounds to 55 pounds, a total of 535 pounds. Between weighings, these cattle had been held in pens where neither water nor feed was available. Respondent Lemons also did the reweighing of these cattle under the supervision of the investigator and did not dispute the higher weights. Nor was any credible evidence introduced into the record by respondents to account for these increases in weight. Respondents' explanation that the center post of the scale was knocked

awry by an animal and thus caused the scale to operate improperly is without merit and is afforded little credibility. However, even assuming the center post was awry, testimony shows that such condition could not have caused such increases in the weights as recorded in the check-weighing. Therefore, the only clear conclusion that can be drawn from 20 incidents of check weighing is that the cattle were knowingly weighed at less than their true and accurate weights.

Documents of record for both occasions show that, with regard to scale tickets, they did not list the proper address of Cumberland City Stockyards. Contrary to respondents' testimony of record, that they were never advised that it was lacking in this respect, the investigator's report of the August 11, 1984, investigation lists this as a violation and his testimony was that this matter was discussed with respondents at that time. Thus, there had been no correction of this item at the time of the May 18, 1985, check-weighing investigation. Although failure by the weighmaster to initial scale slips and record on them the time at which the scale was balanced were recorded as violations on the August 11, 1984, check-weighing report, only failure of time of balance is noted on the investigator's report for the May 18, 1985, check-weighing incident. Documents of record also show that scale tickets/accountings to the sellers of the livestock were issued and paid on the basis of the false and incorrect weights. Further, that buyer invoices were issued, and money collected, on the basis of the same false weights.

Under section 304 of the Act, a registration may be revoked for failure to comply with the orders and regulations issued by the Secretary, **** while under section 307 of the Act unjust, unreasonable, or discriminatory practices are prohibited and declared to be unlawful (7 U.S.C. §§ 205, 208). The false weighing of livestock has consistently been held by the Secretary to constitute an unfair and deceptive practice violative of section 312(a) of the Act (7 U.S.C. § 213(a)). It has also been held to be in violation of regulations pertaining to the instructions for maintenance and operation of livestock scales (9 C.F.R. §§ 201.71, 201.73-1). Additionally, respondents who have failed to keep accounts and records which fully and correctly disclose all transactions involved in their business have been held in violation of sections 312(a) and 401 of the Act (7 U.S.C. §§ 213(a), 221), and sections 201.43, 201.49, 201.55 and 201.73-1 of the regulations (9 C.F.R. §§ 201.43, 201.49, 201.55 and 201.73-1). These accounts and records include accurate and complete scale tickets, as well as accurate and complete accountings of the purchase and sale of livestock. *In re Gus Z. Lancas-*

**** The revocation authority in § 304 of the Act is not relevant here (see § 1, Additional Conclusions of the Judicial Officer).

ter Stockyard, 38 A.D. 824 (1979); *In re Jake Muehlenthaler*, 37 A.D. 313 (1978), *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re C. D. Burrus*, 36 A.D. 1668 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re William C. Moore*, 36 A.D. 2003 (1977); *In re Overland Stockyards*, 34 A.D. 1808 (1975) (and cases cited therein); *In re Trenton Livestock, Inc.*, 33 A.D. 499 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re J. A. Speight*, 33 A.D. 280 (1974); *In re Boone Livestock Company, Inc.*, 27 A.D. 475 (1968).

By virtue of the above practices it is concluded that respondents have willfully violated sections 304, 307, 312(a) and 401 of the Act (7 U.S.C. §§ 205, 208, 213(a), 221), and sections 201.43, 201.49, 201.55, 201.71, 201.73, and 201.73–1 of the regulations (9 C.F.R. §§ 201.43, 201.49, 201.55, 201.71, 201.73, and 201.73–1), as alleged in the complaint.

Finally, respondents argue that the misweighing of the livestock involved here was not willful, and rely on *Capital Packing Company v. United States*, 350 F.2d 67 (10th Cir. 1965), for their interpretation of "willful". However, as noted previously, respondents were well aware of the necessity to maintain and properly operate the scale, specifically, through knowledge of the "Instructions for Weighing Livestock", discussion of violations with Packers and Stockyards investigators, and acknowledgment of the latter's letter to respondents, dated August 21, 1984, which admonished respondents "to take the necessary action to insure accurate weights." However, although pledging they would comply, the check-weighing investigation conducted on May 18, 1985, showed that in 20 separate weighings respondents deliberately weighed animals at less than their true and correct weights with full knowledge that this was prohibited by the Act and the regulations. As noted in *In re J. A. Speight*, *supra*, at 302:

> A violation is willful, within the meaning of the term in a regulatory statute if the violator "1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirement." (citing Goodman v. Benson, 786 F.2d 896, 900, 7th Cir. 1961).

Additionally, the Judicial Officer has ruled this interpretation [*Capital Packing*] is negated by the Supreme Court's decision in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185, 187 (1973). See *In re J. A. Speight*, *supra*, at 303. Thus, the violations of May 18, 1985, were willful.

Findings of Fact

1. Respondents' mailing address is P.O. Box 70, Cumberland City,

Tennessee 37050. (Ans., para. 2; CX–2; Tr. 22) [1]

2. Respondents are, and at all material times were:

(a) Engaged in the business of conducting and operating a stockyard posted under and subject to the provisions of the Act.

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis at the stockyard, and buying and selling livestock in commerce for their own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for their own account. (Ans., para. 2; CX–2; Tr. 22)

3. On August 11, 1984, respondents' stockyard was visited by employees of the Packers and Stockyards Administration who checked the weighing practices at the stockyard by reweighing 16 animals which previously had been weighed by Terry Lemons, an employee of respondents. The reweighing of the livestock by the employees of the Packers and Stockyards Administration reflected that respondents' employee weighed 9 of the animals at less than their true and correct weights. The details of these weighings are as follows:

No.of Head	Mark	Name of Consignor	Sale Weight (LBS)	Weight at Reweighing (LBS)	Weight Difference (LBS)
1	893	S. G. Parchman	520	530	+ 10
1	894	S. G. Parchman	570	575	+ 05*
1	895	S. G. Parchman	530	545	+ 15
1	896	S. G. Parchman	545	555	+ 10
1	906	Katherine Hemby	485	495	+ 10
1	907	Katherine Butcher	400	410	+ 10
1	908	Katherine Butcher	520	530	+ 10
1	910	Mitchell Overton	445	455	+ 10
1	912	Leo Sheppard	450	460	+ 10
1	919	Mark Hemby	625	640	+ 15
1	923	Mark Hemby	470	475	+ 05*

* Not unusual since the break in the scale indicator could have been read as indicated on original weighings, or as read on the reweighings. (Tr. 72–73)

The Department's investigation also disclosed that, in addition to recording the lower weight on the scale ticket and reporting this lower weight to the consignor, respondents issued accounts of sale to the con-

[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

signors of the livestock on the basis of these false weights, issued buyer invoices to the purchasers of such livestock on the basis of the false weights, and collected the purchase prices from the purchasers of the livestock on the basis of these false weights. In addition, the scale tickets which were issued by respondents failed to show the time of the scale's balancing, the exact address of the market, and all were not initialed by the weighmaster. No feed or water was available to the livestock between the original weighing and the check weighing. (CX-6-10; Tr. 24-38, 54-55, 60, 63, 76)

4. The scale tickets in use at Cumberland City Stockyard on August 11, 1984, and on May 18, 1985, contained the same heading, "Cumberland City Stockyards." Following the August 11, 1984, check weighing, the deficiencies found by the investigators, including "Address of market not shown on scale tickets," were brought to the attention of and discussed with the respondents. (CX-6; Tr. 37)

5. By letter dated August 21, 1984, respondents were also notified of the discrepancies found on August 11, 1984, and reminded that they were "responsible for accurately weighing livestock consigned to them for sale." Respondents, by letter dated September 1, 1984, notified the Department that they had taken steps to correct the errors found on August 11, 1984. (CX-11-12; Tr. 38-39)

6. Respondents' scale was tested on May 7, 1985, by an employee of the State of Tennessee. Although it was not properly calibrated, after an adjustment by respondents, it satisfied the State's standards. (CX-18; Tr. 82-87)

7. A follow-up investigation as to respondents' weighing practices was conducted by an employee of the Packers and Stockyards Administration, accompanied by an employee of the State of Tennessee, on May 18, 1985. The investigation disclosed that respondents weighed consigned livestock at less than their true and correct weights, issued scale tickets and accounts of sale to the consignors of the livestock on the basis of the false weights, paid the consignors of the livestock on the basis of the false weights, issued buyer invoices to the purchasers of the livestock on the basis of the false weights, and issued scale tickets which failed to show the time of balance, the address of the market, and which were not initialed by the weighmaster. (CX-13-17; Tr. 40-51, 55-57)

8. The purpose of a check-weighing investigation is not to determine the accuracy of a scale, but whether the scale is operating properly and the weighmaster is performing his functions properly. An inspection of the scale by the Packers and Stockyards Administration's employee and the employee of the State of Tennessee on May 18, 1985, failed to disclose any physical reason why the scale would have weighed the livestock at less than their true weight. The scale was operating properly

i.e., there were no binds, the beam indicator moved freely and it was returning to zero balance. (Tr. 43–44, 66–69, 198–202)

9. The investigation on May 18, 1985, showed the reweighing of 21 head of cattle, previously weighed by Respondent Lemons, as follows: (CX–13–17)

No. of Head	Mark	Name of Consignor	Sale Weight (LBS)	Weight at Reweighing (LBS)	Weight Difference (LBS)
1	513	Willie Sterns	215	230	+ 15
1	514	Willie Sterns	220	240	+ 20
1	515	Willie Sterns	615	670	+ 55
1	516	Terry Feain	395	425	+ 30
1	517	T. Feain	255	275	+ 20
1	520	Carl Phillips	390	410	+ 20
1	521	Carl Phillips	505	525	+ 20
1	522	Carl Phillips	455	480	+ 25
1	523	Carl Phillips	605	630	+ 25
1	524	Carl Phillip	230	260	+ 30
1	525	Carl Phillips	250	285	+ 35
1	526	Carl Phillips	320	345	+ 25
1	529	Carl Phillips	345	370	+ 25
1	533	Sanford & Sanford	200	220	+ 20
1	534	Ed Dillon	315	350	+ 35
1	535	Jessie Kirkland	520	545	+ 25
1	536	Jessie Kirkland	350	380	+ 30
1	537	Jessie Kirkland	550	575	+ 25
1	538	J. Kirkland	310	340	+ 30
1	539	J. Kirkland	250	275	+ 25
1	549	Bruce Sills	900	905	+ 5*

* Not unusual since the break in the scale could have been read as indicated on original weighing, or as read on the reweighing. (Tr. 72–73)

10. On May 18, 1985, respondents' scale may or may not have heen accurately calibrated; however, the same weight, or a smaller amount, would have been obtained if the same animal was placed on the scale a second time within a reasonable period. No feed or water was available to the animals in the time elapsed between the original weighing and the check–weighing. Normally, in thls sltuation, livestock will shrink and therefore weigh less than when previously weighed. It is almost impossible for an animal to gain weight under these conditions. (CX–18, 19; Tr. 37–38, 45, 68, 70, 84–89, 134–141)

11. On May 22, 1985, respondents' scale failed to satisfy the standards of the State of Tennessee during a test conducted by an employee of the State. (CX-19; Tr. 51-52, 71, 87-89).

12. After being adjusted by an employee of the Systems Scale Corporation, 332 Hill Avenue, Nashville, Tennessee, on May 23, 1985, a test of it on that date reflected that respondents' scale satisfied the standards of the State of Tennessee. (CX-20; Tr. 52-53, 89-92, 121-123)

13. None of the problems which required adjustment by respondents on May 7, 1985, or by the Systems Scale Corporation on May 23, 1985, would have caused the scale to misweigh the livestock as found by the Department's investigator on May 18, 1985. (Tr. 134-141, 198-202)

14. The proper weighing of livestock is a basic tenet in the livestock industry. Such proper weighing is so basically necessary and important that great emphasis is placed on it by the Act and regulations through specific instructions for the use of livestock scales. Additionally, the Packers and Stockyards Administration has issued "Instructions for Weighing Livestock" and requires a weighmaster to be knowledgeable of, and fully comply with, these instructions. The evidence of record discloses that respondents' officials were aware of proper weighing practices and with the requirements of published regulations and instructions. False weighing of livestock, therefore, is an extremely serious violation of the Act. (CX-3, 4, 5, 11, 12; Tr. 97).

15. Respondents conduct a profitable business showing a net profit of, approximately, $45,000 on each of their 1983-84 and 1984-85 annual reports. (Tr. 98-99)

16. Within a 50-mile radius of Cumberland City, Tennessee, there are at least four other markets available to serve the consignors who have sold livestock through respondents. (Tr. 100).

Sanction

False weighing of livestock is a serious violation because consignors, who rely on market agencies to accurately weigh their livestock, have little or no ability to protect themselves against such practices. Additionally, such practices cost farmers and ranchers money when their livestock is short weighed. Therefore, it has been the Department's policy to impose severe sanctions for serious violations of the Act. This severe sanction policy has been set forth at length in *In re Worsley*, 33 A.D. 1547, 1556-1571 (1974), has been discussed at length in *In re Esposito*, 38 A.D. 613, 624-665 (1979), and has been sustained in court decisions, e.g., *In re Muehlenthaler*, *supra*; *In re Collier*, 38 A.D. 957 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980)

(unpublished). [2]

Complainant here seeks suspension of the registrants under the Act for a period of ninety (90) days, and a civil penalty in the amount of ten thousand dollars ($10,000.00) to be assessed jointly and severally. This sanction is in accordance with the announced policy of the Department and is determined to be appropriate under the circumstances. It has been shown in the record that respondents operate a profitable business and showed a profit of approximately $45,000.00 on each of their 1983-84 and 1984-85 annual reports. Further, that there are other marketing outlets for farmers and ranchers who normally sell livestock through respondents.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ's findings and conclusions are not adequately supported by the record, but the record abundantly supports the ALJ's findings and conclusions. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required. [3] Respondents' argument on appeal, in this respect, merely reargues matters that were fully considered and correctly decided by the ALJ.

Where, as here, an agency adopts the ALJ's findings of fact based on his credibility determinations, the findings become almost unassailable. That is, the reviewing court may not upset the findings herein unless it finds them hopelessly incredible or flatly contradictory to either a so-called "law of nature" or to undisputed documentary testimony. The reasons underlying these principles were recently restated in *In re Collins*, 46 Agric. Dec. ____, slip op. at 15-16 (Mar. 4, 1987):

> It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's since they have the opportunity to see and hear the witnesses testify. [5] When an agency *adopts* findings of fact by an ALJ based on credibility determinations, the task of the reviewing court is easier than when the agency overrules such findings, i.e., an ALJ's findings of fact based on credibility determinations, adopted by the agency, are almost unassailable. *Blackfoot Livestock Comm'n Co.* v. *USDA*, [810 F.2d 916 (9th Cir. 1987)]. As stated in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

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[2] The Department's sanction policy was clarified and expanded in *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987), *appeal docketed*, No. 87-7189 (9th Cir. Apr. 27, 1987) (See Appendix c).

[3] *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 91-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), aff'd, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec.1336, 1346 (1978), aff'd, No. 78-3134 (D.N.J. May 25, 1979), *affd mem.*, 614 F.2d 770 (3d Cir. 1980).

[5] *E.g.*, *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 555 (1981); *In re Thornton*, 38 Agric. Dec. 1425, 1426–28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208–09 (1979) (remand order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

> When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); International Union v. NLRB, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); NLRB v. Stark, 525 F.2d 422, 425–26 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976); NLRB v. Columbia University, 541 F.2d 922, 928 (2d Cir. 1976).

I also find without merit respondents' other specific arguments. (i) that the ALJ fatally erred in citing 7 U.S.C. § 205 as authority for suspension of respondents' registration; (ii) that the ALJ's findings ignored crucial evidence; (iii) that there was no reason for respondents to short weigh; (iv) that these violations were not willful; and (v) that the penalty imposed is inappropriately severe. These will be addressed, *seriatim*, hereafter.

I. ALJ's Miscitation of 7 U.S.C. § 205 for § 204 as the Suspension Authority Is De Minimis, Harmless Error.

Although the ALJ did, apparently, cite the wrong provision (7 U.S.C. § 205; Initial Decision at 6) as the authority for suspension, rather than the correct "suspension" provision (7 U.S.C. § 204), this is *de minimis*, harmless error.

The complaint correctly alleges the provisions of the Act and regulations violated by respondents' conduct, including § 304 of the Act (7 U.S.C. § 205). The complaint alleges (Complaint at 5):

IV

> By reason of the facts alleged in paragraphs II and III above, the respondents have wilfully violated sections 304, 307, 312(a) and 401 of the Act (7 U.S.C. §§ 205, 208, 213(a), 221), and sections 201.43, 201.49, 201.55, 201.71, 201.73, and 201.73–1 of the regulations (9 C.F.R. §§ 201.43, 201.49, 201.55, 201.71, 201.73, 201.73–1).

Section 304 of the Act (7 U.S.C. § 205) provides as follows (emphasis added):

§ 205. General duty as to services; revocation of registration

All stockyard services furnished pursuant to reasonable request made to a stockyard owner or market agency at such stockyard shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatnry: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter, and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title.

The term "stockyard services" includes "services or facilities furnished at a stockyard in connection with the . . . weighing . . . of livestock" (7 U.S.C. § 201(b)). Hence any stockyard operator who falsely weighs livestock violates § 304 of the Act (7 U.S.C. § 205), as well as §§ 307 and 312(a) (7 U.S.C. §§ 208, 213(a)).

The ALJ was, however, in error if he thought that the revocation provisions in § 304 of the Act are applicable to this case. The authority of the Secretary to suspend respondents' registration is in 7 U.S.C. § 204 (quoted in Appendix A, *infra*). However, even if the ALJ mistakenly believed that the Secretary's suspension authority is in § 304 of the Act (7 U.S.C. § 205), that would have been harmless error.

Respondents erroneously argue that the standard of proof would have been less under 7 U.S.C. § 205 than under 7 U.S.C. § 204 because, respondents contend, a suspension order could be issued under 7 U.S.C. § 205 "for alleged failure of the registrants to comply with the regulations of the secretary regarding weighing" (Respondents' Appeal at 2). Respondents continue (Respondents' Appeal at 2–3):

> If the interpretation of the complainant and the ALJ in this case were correct the USDA could suspend the registrants simply because the registrants literally "failed" (despite their efforts to get scale repairmen to fix the scale) to weigh livestock accurately. This interpretation would substantially lower the burden of proof that is on the complainant.

However, the burden of proof would be no different under 7 U.S.C. § 205 than under 7 U.S.C. § 204. Under either section, the burden of proof is by a preponderance of the evidence (see note 3, *supra*). Specifically, if a stockyard operator fails to comply with the regulations issued to insure correct weighing of livestock at stockyards, the stockyard operator has engaged in an "unfair" practice in violation of §

312(a) of the Act (7 U.S.C. § 213(a)), and has failed to furnish "reasonable" stockyard services, in violation of §§ 304 and 307 of the Act (7 U.S.C. §§ 205, 208). Accordingly, if the ALJ erroneously believed that the revocation provisions in § 304 of the Act (7 U.S.C. § 205) were applicable here, it would have been harmless error.

Moreover, the ALJ's suspension order is not based on a mere failure to comply with the regulations, but, rather, on the ALJ's findings and conclusions that respondents falsely weighed livestock. That is also the basis on which I am suspending respondents' reglstration.

In the proceeding at hand, complainant's counsel specifically questioned Mr. John T. Lacy, Chief, Scales and Weighing Branch, Packers and Stockyards Administration (P&S), about the statutes under which P&S was proceeding, and Mr. Lacy testified that the suspension provision is 7 U.S.C. § 204 (Tr. 101–02) (emphasis added):

> BY MR. OLSEN:
>
> Q. Mr. Lacy, you indicated in your first item on your list of factors the statutory requirements. Can you tell me what those are?
>
> A. It is contained in Section 312(B) of the Packers and Stockyards Act, and it deals with the imposition of a civil penalty. I can't state it verbatim.
>
> Q. *Is that the only section*?
>
> A. With regard to civil penalty. *The authorization for suspension is contained in U.S.C.-- It is 7 U.S.C. 204*, I believe, which is incorporating the Packers and Stockyards Act.

If the ALJ erred in this respect, his error was harmless.

II. The ALJ's Findings Do Not Ignore Crucial Evidence, but, Rather, Are Squarely Based upon Substantial Evidence on the Record as a Whole.

The ALJ's findings do not ignore crucial evidence but, rather, are squarely based upon substantial evidence on the record as a whole. However, the large majority of respondent's appeal brief is devoted to the arguments that the ALJ's findings are unsupported by the record, and that the findings ignore crucial evidence. Of the many arguments raised in respondents' lengthy appeal, seven major arguments will be addressed, *not* because they must be refuted to show that the initial decision is a correct one (which it is), but, rather, to show that the *sanction* herein is a fair one.

Apart from the fact that *willfulness* certainly is not at issue in this proceeding (see § IV, below), respondent's overall argument is transparently that if the scale can be shown to be mechanically malfunctioning, then respondents are to be absolved from misweighing. However, not only does the large preponderance of the evidence fail to show the scale malfunctioning in the ways claimed by respondents,

even if it was somewhat mechanically off, the scale would not have behaved in such a fashion as to light weigh the check-weighed animals in the manner recorded by P&S investigators. This will be patently obvious from an analysis of seven of the arguments alleging scale malfunction raised in respondents' appeal brief of July 21, 1986; which will be referred to as RAB, followed by the paragraph number of the argument:

1. Adjustments or Movements in the Balance Ball of the Scale on August 11, 1984 (RAB #7) and on May 18, 1985 (RAB #26).

2. Center Post of the Scale Gate Was Occasionally "Hanging Up" on the Side of the Scale Pit on August 11, 1984, Check-Weight Test (RAB #8).

3. Nose Iron Was Loose, Causing the Scale to Weigh 5 or 6 Pounds Light on May 7, 1985 (RAB #9) and Erratically Light on May 18, 1985, Check-Weight Test (RAB #15, 16).

4. Center Post of the Scale Rack Was Binding Against Pit Wall on May 18, 1985 (RAB #11, 12, 18-22).

5. Scale Was "Bottoming Out" (RAB #22, 23).

6. Scale Was "Warped" (RAB #24, 27).

7. Placement of Weights on Scale (Corner Tests), and Dirt and Sawdust in Levers (RAB #17, 23).

1. Respondents' Argument Concerning Movements or Adjustments to the Balance Ball on August 11, 1984, and May 18, 1985, Was Not Raised by Any Party at the Hearing, Has No Merit, and Is Given No Weight Here.

In respondents' own words, "[n]o evidence was presented regarding any movements or adjustments to the balance ball on the scale during the August 11, 1984" (RAB #7) original weighing or check-weight test, or between the two. Thus, this argument is entitled to no weight at all. To allow respondents' to raise new issues on appeal would be unfair to complainant. Even if I were inclined to consider this argument, which I am not, there is no evidence of record upon which to base any consideration. Respondents' argument asks for mere speculation, which is not appropriate.

This same analysis applies to respondents' identical argument concerning the May 18, 1985, check-weight test (RAB #26). This same argument has no merit because, as respondents say in their argument, "[t]here also was no evidence regarding any adjustments or movements of the balance ball on May 17 [sic]" (RAB #26).

Thus, I find that respondents' arguments concerning the scale's balance ball are without merit.

2. Substantial Evidence of Record Refutes Respondents' Argument that the Center Post of the Scale Gate Was Binding on the Scale Pit during the August 11, 1984, Check-Weight Test.

Although respondents argue that the light weighing detected by the August 11, 1984, check-weighing test can be "assumed" to have been caused by the binding of the center post of the scale gate against the side of the scale pit (RAB #8), there is substantial evidence of record that there was no binding.

Mr. Jimmy W. Thompson, a P&S investigator and scale expert, testified that on August 11, 1984, he and another P&S employee conducted a check- weight test at respondents' scale, that he (Thompson) looked at the scale; that he lonked around the scale; that he checked the balance on the scale; that everything looked proper; that he obtained a good zero balance on the scale; that there were no obvious physical impairments; and that there was *nothing binding*. He testified (Tr. 26-27):

> Q. After you reached this agreement that you were going to conduct this check-weighing, what happened next?
>
> A. I asked Mike to select, along with Robert-- I asked them to select some livestock from the pens, and they did. While they were selecting, I looked at the scale and around the scale and checked the balance on the scale. I saw that everything looked proper. At that time, we had obtained a good zero balance on the scale, and they brought up some livestock.
>
> Q. When you were viewing the scale, walking around there and looking at it, did you see any obvious physical impairments?
>
> A. No.
>
> Q. Was there anything binding?
>
> A. No.

During and after the August 11, 1984, check-weighing test, P&S investigators continued to seek zero balance of the scale, and the zero balance repeated every time. Although a scale that was binding would be expected to reveal itself as such during close examination, while a series of check-weight animals were weighed, no binding was found. Mr. Thompson testified to a series of drafts after which a zero balance was achieved each time, as follows (Tr. 54-55):

> Q. . . . What I want you to really focus on is the actual weighing, what you did with the scale, and what you did with the animal.
>
> A. Okay. The first thing we did at the start of the check-weighing was to check the balance on the scale. That is noted up at the top part, that the balance condition at the time of arrival was zero. The scale was in balance when we checked it.

We started check-weighing at about 10:45. Again, before we put an animal on the scale, we checked the zero balancing; and, again, it was in balance.

For the one on August the 11th, Mike Huff was there; and he and, I believe, Ray Parchman, selected the animals from the pen or got the animals out of the pen and brought them to the scale.

In this case, we weighed four animals from 10:39. While they were getting two more animals out of the pen, I checked the zero balance again. The zero balance had not changed, and I noted that at 10:50.

After those two animals were weighed, they picked six out of Pen 40; and before they put one on, I again checked the zero balance. The zero balance had not changed at 10:54.

We weighed those six animals. Well-- I don't know what pen they came out of, the last four. But before those last four were weighed, I checked the zero balance again. The zero balance had not changed.

After those last four were weighed, I again checked the zero balance at 11:03. The zero balance had not changed again.

Q. So the zero balance repeated every time you checked it?

A. Yes, it did.

A zero balance, which consistently repeats, with no binds, indicates that the scale is operating *properly*, although not necessarily *accurately*. For the purpose of check weighing to determine the proper performance of the weighmaster, it is not necessary that the scale be *accurate*, only that it be properly functioning. Mr. Thompson testified expertly on this issue and stated the difference, as follows (Tr. 66-67):

Q. Did you testify earlier in answer to the question about whether the scale was operating properly-- I believe you testified that the scale was operating properly, is that correct?

A. Yes.

Q. How do you know that?

A. There is a difference between operating properly and accurately. If the scale is operating properly, that means it has no binds, the beam or indicator was moving freely, and it is returning to a zero balance. To test the accuracy, you would need to calibrate test weights. We did not have any at that time.

. . . .

A. Again, a check-weighing investigation is not to determine the accuracy of a scale. It is to determine if a weigh-master is

weighing correctly. We are not concerned at that time with the accuracy of the scales, but whether the weigh-master is performing his functions properly.

Being further pressed by respondents' counsel on this point, Mr. Thompson testified that a scale would return to zero balance when there are no binds. And, if there were no binds, even if the scale was malfunctioning, an animal that is weighed on the scale will weigh the same, or less, when put back on the scale after a period of time. Certainly, no animal should gain weight in this circumstance. As Mr. Thompson testified (Tr. 69–70):

Q. Well, I think that what you are trying to tell me is that if the zero balance returns each time to zero correctly, that the scale is not malfunctioning. Is that correct?

A. In all probability, it is not. What I think I am trying to say here is that if a scale is not binding, if you release the beamlock and the scale is moving freely and returns to a zero balance, that there are no binds. Even if the scale is malfunctioning, if you put a weight or an animal on that scale and get a weight and then take the animal off the scale; then if in five or ten minutes or immediately thereafter, if you put it back on the scale, you should get the same weight or a smaller weight, depending upon how long it has been since you weighed that animal. You certainly should not get a gain in weight.

Q. So what you are saying is that if the scale returns to a zero balance after weighing an animal, the scale is operating correctly, and it is not malfunctioning?

A. Basically, yes.

This testimony on the behavior of heavy-duty livestock scales was corroborated by Mr. Danny R. Lashley, the private-sector scale expert employed by Systems Scale Corporation; and subpoenaed to appear herein by respondents. Mr. Lashley testified that even a malfunctioning scale, if it has no binds, will repeat the same weight for the same animal. Mr. Lashley examined this scale a few months earlier from the August 11, 1984, check- weight test on March 28, 1984, and saw no binds. He testified (Tr. 135):

Q. If I put on a steer weighing 325 pounds, if I put him on two times in a row, whatever the scale was registering, it would register the same?

A. Yes, sir. If zero balance-- If you have got a zero balance and the scale is out of calibration, normally with no binds, it will repeat the same weight.

Q. And you didn't see any binds, did you?

A. No, sir. I didn't.

Q. Looking at page five of that exhibit [RX 3], when did you perform this particular test?

A. It was dated 3/28/84.

Q. Was that before or after you made the adjustment?

A. This particular one on page five, this is the test before the adjustment.

Q. What was the error in the 50- through 500-pound weight range?

A. I have it as zero.

Of course, what witness Lashley testifies to as the condition of the scale as of March 28, 1984, has no direct bearing on the condition of the scale at the time of the August 11, 1984, check-weight test. However, since respondents' defense is to attack the scale (mechanically) at every opportunity, it is appropriate here to balance those arguments against testimony from their own subpoenaed witness (Lashley).

Although respondents' defense on appeal is that the scale was binding on August 11, 1984, respondents' testimony, delivered by respondents' witness, Mr. Terry Lemons, is that the scale became unbalanced because he (Terry Lemons) was too busy as weighmaster to check properly the balance of the scale during that morning's rushed business.[4] Specifically, Mr. Terry Lemons blames the misweighing on his failure to balance the scale. He testified (Tr. 144-45) (emphasis added):

Q. What occurred after the check test was completed?

A. Well, he took the tickets over to the office. We went back to weighing stock, you know, that was coming in. Well, he told me, he said, "I am going to take the tickets over to the office and match them against the tickets that you weighed."

I don't know how long it took him, but then he came back and said, "You have a discrepancy in your weights." I said, "Well, what seems to be the problem," and he explained it to me. I said, "Well, it very well could be. I have been here all day by myself."

Robert Parchman, the man that runs the barn, he wasn't there. I had been there with two schoolboys that particular morning. My father was out of town on vacation. I had got behind. I was weighing the cattle and tagging them and sorting them and letting them off. I was basically doing most of the job myself.

I guess I had let about a 45-minute to hour period there go by that I got lax in checking my balance, which is what I would say caused the difference in the weight.

[4] I note here that Mr. Terry Lemons' testimony admits weighmaster's violations of 9 C.F.R. § 201.73-1(a)(1), failing to balance the empty scale and keep it in balance, and of 9 C.F.R. § 201.73-1(c)(3), permitting "hurried" operations resulting in "inaccurate weighis or incorrect weight records."

Q. As far as you could tell, the scale appeared to be operating properly?

A. From my point of view inside of the scale house. When it came on the center, I would stamp the weight.

Q. *Did Mr. Thompson indicate that the scales were operating properly*?

A. *I suppose he did.* He weighed the cattle.

Q. And were you present when he weighed the cattle?

A. No. I was out in the alley putting the cattle on the scales.

Q. Did you after that time discuss the matter with Mr. Thompson at any time?

A. Yes. We talked about it, and I admitted, I guess, that was the problem. Of course, some of them was five and ten or 15 or 18 pounds on seven or eight cattle. I don't recall the exact number.

We discussed it, and he said, "Well, it looks like you were lax in balancing the scales. We will probably be sending you a reprimand letter by mail." He told me to be more careful. I said, "Well, I will pay more attention to that in the future."

Moreover, Mr. Terry Lemons was specifically asked, during his testimony on the May 18, 1985, check-weight test, if the gate post was binding at any *other* time than the May 18, 1985, test, and Mr. Terry Lemons responded that it had been a problem before, but that he had not told Mr. Thompson of it during the August 11, 1984, check-weight test. He testified (Tr. 151) (emphasis added):

Q. Is this the location of the place where the post was pushed out that we talked about earlier?

A. Yes.

Q. And it was actually catching on the side of the pit?

A. Yes.

Q. That occurred that day [May 18, 1985]?

A. Yes.

Q. And is that the first time that had happened with that scale?

A. Do you mean the post getting kicked out at the bottom?

Q. Yes.

A. No. Like I say, it had happened before a time or two, and we would put it back in. The post, like I say, it has been there a long time. It was rotted right at the bottom, and we would nail it and thought we had it repaired, you know. But it had come out on a few other cases.

Q. *At any time before that when the scales were looked at or inspected by Mr. Thompson, did you indicate that you considered that a problem with the scale?*

A. *No. I hadn't said anything about it, no.*

The evidence is thus clear that there were no discernible binds in the scale on August 11, 1984. Moreover, Mr. Terry Lemons' other explanation-- that he had failed to balance the scale properly on that date-- is also without merit. Although the regulations (9 C.F.R. § 201.73-1(a)) require the weighmaster to balance the scale periodically during weighing, which Mr. Terry Lemons did not do, such continuing balancing before the check- weight test would not have changed the light weighing detected by the check-weight test.

P&S expert Mr. Thompson testified at the very end of the hearing that such lack of balancing by respondents would possibly have caused the scale to go to the *plus* side due to debris on the scale, but in virtually no circumstance could an animal "gain" weight while being held gaunt between weighings. He testified (Tr. 203-04):

> Q. (By Mr. Silverstein) You have heard the testimony from Mr. Lemons indicating that he believed the discrepancy between the weight that he weighed in the cattle on August the 11th, 1984, and the weight that you found when you were check-weighing was caused by his failure to zero balance the scale as required by the regulations?
>
> A. Yes, sir.
>
> Q. I am asking you if you can to state what you believe as an expert in scales and weights would have occurred with regard to a discrepancy between the two weights, if, in fact, a weighmaster had failed to zero balance the scales.
>
> A. If the scale had been zero balanced prior to the start of weighing the livestock, and if the livestock had been weighing coming onto the scale and the zero balance had not been checked for 45 minutes to an hour, these animals coming on the scale will normally drag dirt and different types of foreign matter onto the scale. This will tend to make the scale weigh heavier rather than lighter.
>
> Any time that you check the zero balance, or most of the time that you check the zero balance on the scale during the livestock sale, you will find that the balance has increased or gone to the plus side, rather than going to the minus side.
>
> Q. All right. So what you are saying, if I understand it, is that if that was the case, and if, in fact, a discrepancy had occurred because of the failure to zero balance, what you should have found when you check-weighed is a large shrink rather than an increase in weight?
>
> A. Yes, sir.

Because of the foregoing, I find that there is no credible evidence that the center post of the gate was occasionally "hanging up" or binding during the August 11, 1984, check-weight test. Moreover, the substantial evidence of record is that respondents' failure to maintain a continuing balance in its scale on August 11, 1984, would not have caused light weighing on that date.

3. Evidence that the Nose Arm Was Out of Calibration, and Evidence that Adjustments Were Made to the Nose Arm, Do Not Explain the Light Weighing Detected, Because the Errors Did Not Repeat in Either Check-Weight Investigation.

The substantial evidence of record is clear that the scale's nose arm (also called nose "iron"; the main fulcrum or calibration point for fine-tuning the scale) was out of calibration at crucial periods in the chronology of this proceeding; however, this does not help respondents' case because the errors ascribed to nose-arm maladjustment *did not repeat*.

In fact, I view the evidence concerning the many adjustments of the nose arm to be at least as *damaging* to respondents' case as respondents seem to think it helps their case. Even before the first check-weight test on August 11, 1984, Mr. Lashley of Systems Scale Corporation had adjusted the nose arm (on March 28, 1984), presumably in the presence of respondents. Mr. Lashley testified that he adjusted the nose arm on that date to achieve correct calibration, but that any error in the calibration would have repeated, if there were no binds, and Mr. Lashley testified that there were no binds. He testified (Tr. 134-35; and see RX 3) (emphasis added):

> BY MR. SILVERSTEIN:
>
> Q. Mr. Lashley, the repairs you made on the scale on March 31, 1984 [sic], what kind of repair was that?
>
> A. That was adjustments.
>
> Q. What kind of adjustments?
>
> A. *Nose iron adjustments*. I was trying to think. I don't think that was done on the 31st.
>
> Q. Excuse me. That was March 28th. The date of the invoice is March 31.
>
> JUDGE MC GRAIL: You are referring now to Respondent's Exhibit Number 3?
>
> MR. SILVERSTEIN: Yes, sir.
>
> Q. (By Mr. Silverstein) You adjusted the nose iron on that date?
>
> A. Yes, sir. As far as I remember, that is what we did. It was a nose iron adjustment to bring the scale into calibration.

Q. Was the error which was in the scale on that date a repeating error?

A. On the 28th?

Q. Right.

A. Well, I don't have any way-- Explain what you mean.

Q. If I put on a steer weighing 325 pounds, if I put him on two times in a row, whatever the scale was registering, it would register the same?

A. Yes, sir. If zero balance-- *If you have got a zero balance and the scale is out of calibration, normally with no binds, it will repeat the same weight.*

Q. *And you didn't see any binds, did you?*

A. *No, sir. I didn't.*

Mr. Lashley was then asked a series of hypotheticals about the behavior of the scale when certain weights are put on it. The important thing here is that unless there are binds in the scale, the scale being out of calibration will not cause nonrepeating errors; and, it is very unlikely that the second time the *same* animal is put on there would *always* be a resultant gain in weight. Mr. Lashley testified (Tr. 139) (emphasis added):

Q. If a scale is weighing erratically, and if there is a non-repeatable error, what is the likelihood of the error being a plus error every single time?

A. It is very unlikely.

Q. So that--

A. Let me restate that. It depends on what you are saying. I don't understand the question.

Q. Okay. I will see if I can explain it. Counsel for the Respondents has proposed certain circumstances to you to establish that the scale that balances zero still may show erratic weights. Is that right?

A. Yes, sir.

Q. Now what I am asking you is this. Under those circumstances every single time you weighed those animals twice, should you get a plus reading the second time? Do you understand what I am asking you?

A. You are saying that every time you put the same load on it--

Q. I am asking you why it is that every time the animal is put on the second time you get a plus reading.

A. Well, like I say, with no balance changes and with no binding or whatever, it should be repeating. *If it is out of calibration, it will repeat the same way.*

Thus, there is the very high likelihood (almost to a certainty) that respondents were aware, at least as early as March 28, 1984, that their old scale's calibration could be manipulated (to weigh heavy or light) merely by tapping on the nose arm. After that, there is acknowledged testimony that respondents were tapping on the nose arm to manipulate the calibration. The fact that they had the blessing of the State of Tennessee's scale man, Mr. Moss, does not mitigate their subsequent false weighing, because there is no evidence that Mr. Moss instigated or condoned light weighing. His testimony is that he corner-tested the scale with 2,000-pound weights on May 7, 1984, and found it 5 to 6 pounds light. Mr. Moss then allowed respondent, Mr. Robert Parchman, to manipulate the nose arm to achieve an accurate weight, which is Mr. Moss' "common sense" procedure, when all four corners of the scale show the same discrepancy. Mr. Moss testified (Tr 84–85):

On this particular test, I had 15 pounds of balance weights. On the corner test, I used 2,000 pounds on each corner. They averaged-- Well, they were either six or five pounds off or light, meaning that the scale, if there was 2,006 pounds on the scale, the scale would register only 2,000 pounds.

Q. Is that five or six pound difference acceptable tolerance?

A. No, it is not.

Q. What happened if you found that on a scale?

A. On the agreement with the owners, I allowed them to tap the nosearm, which is the main adjustment for the scale. It is what the steelyard or the beam rod attaches to coming out [out] of the scale house. I allowed them to-- We worked with the scale and got the scale down. It is a more or less a common sense procedure that I have allowed in order if the scale is off to the same degree on all corners, then normally all that is wrong with the scale is that the nosearm needs tapped in one direction or the other.

Q. And the nosearm is in the pit?

A. Yes, it is.

Q. And the adjustment was made in the pit?

A. Yes, it was.

Q. Do you remember who made the adjustment?

A. Mr. Parchman.

Q. Did you watch him while he made the adjustment?

A. Yes, sir.

Q. Did he have to loosen the nosearm to make the adjustment?

A. Yes, sir. There are two different screws that he had to loosen and tighten back up.

Q. In other words, in order to make the adjustment, he had to tap the nosearm to make the adjustment?

A. Yes. There are two different screws that he had to loosen and tighten back up.

Q. In order to make the adjustment, he had to tap the nosearm with a hammer?

A. Yes.

Q. And you saw him do that?

A. Yes, sir.

Respondent Mr. Robert Parchman testified that he had manipulated the nose arm to adjust the calibration on the scale on May 7, 1985. It is obviously clear that this is the secret of how to cause the scale to weigh "light," that this was known to respondents on May 7, 1985 (at least), and almost certainly was known to respondents prior to that. What we have here is respondent Robert Parchman industriously manipulating the scale nose arm, purportedly seeking *accurate* weights. The problem with all this benign manipulation is that, without any evidence of binding in any part of the scale, the check weights recorded by P&S *should have repeated respondents' weights. They did not!*

Since both P&S check-weight tests show nonrepeating *gains* in weight, the respondents' "benign" fiddling with the nose arm does not explain the discrepancies, but, to the contrary, highlights the fact that someone may have continued to manipulate the scale nose arm to continue to weigh light both *after* the August 11, 1984, P&S check-weight test and *after* the May 7, 1985, state test. Mr. Parchman's testimony makes clear how well versed in scale nose-arm manipulation respondents were, down to using lubricants on the nose arm screws. He testified (Tr. 177-79) (emphasis added):

Q. Do you recall after the August 11th check test, was there any work done on the scale shortly thereafter?

A. No, sir. We just knowed that the scales sometimes, especially during the last two or three years, have been red-tagged. We would have to call the scale people, and we tried to keep aware of it. They have been red-tagged two or three times in the time Mr. Moss has been coming. Well, Mr. Moss come up there, and he was going to have to red-tag them again, but he let us work on them. We thought we had them in working condition.

Q. When was that?

A. . . . It was the 7th of May. That was when Mr. Moss called and set up a date to test the scales. It was Tuesday a week or so before Mr. Thompson come on a Saturday. We was doing some work on them, and the further we went, the further we got off.

He was going to have to red-tag the scales, and that means that you have a week or 10 days to have it fixed; and every time we called the scales people, they charged from $600 to $900 to come down and do three hours' work. *So the other time, everybody was watching to see what they did, and we seen how they fixed them.*

Mr. Moss said that we could work on them, but he couldn't help us, and then he could check them out.

Q. So did Mr. Moss observe you making adjustments to the scale?

A. Yes, sir. He didn't help in any way.

Q. Is that the only time you have ever worked on them?

A. Yes. I had been under them to clean out the dirt, but that is the only time that we have ever worked on them.

Q. You heard Mr. Moss' testimony this morning, Mr. Parchman, regarding adjustments to the beams and bolts on the end?

A. Yes, sir. You had two of them that you had to loosen up. *We put quite a bit of WD-40 on them, and so, I mean, they were working a lot looser after we let the WD-40 set on them a while.* I didn't know whether we was supposed to hit them this way or that way to make the scales balance right. We had to do it maybe three, four or five times to get it right.

We had to tighten it up, and we had to get the scales back on there. It took us at least maybe three or four or five tries to get it right.

Q. Mr. Moss did observe throughout the procedures, and finally the scales were to his satisfaction, and he approved them?

A. Yes, sir. If he didn't like them, he would have red-tagged them on us. Then we would have had to call the people out of Nashville.

Respondents were specifically asked at the hearing whether they knew how "to cheat," and respondent Ray Lemons testified that he could cheat, although "it would be pretty hard to do" (Tr. 172). He testified (Tr. 172):

Q. I am not saying that you did or would, but if you wanted to cheat, you would know how?

A. It would be pretty hard to do.

Q. But you could do it?

A. Yes. You have got gangsters who can do anything. Most of my time, there was somebody in the scale house with me wanting to blab about something or other.

Less than two weeks after the May 7, 1985, state test (May 18, 1985), the second P&S check-weight test occurred, and the scales once again were registering light on check-weight animals (but not repeating!) as detected by Mr. Jimmy Thompson of P&S (Tr. 87). Mr. David Moss, at the request of Mr. Thompson, returned to conduct a scale test on May 22, 1985, at which time he found the scale weighing light by 10 pounds; and condemned the scale (Tr. 88-89). Mr. David Moss returned to the scale the following day, May 23, 1985, to retest the scale, after it was repaired that day by Mr. Danny Lashley of Systems Scale Corporation. Mr. Moss testified that Mr. Lashley adjusted the nose arm, which at the time was loose and could be easily moved by a tap or a knock. He testified (Tr. 90-91):

Q. Would you please state what you observed him [Lashley] doing on May the 23rd, 1985?

A. With the nose iron, I observed that the nose iron was loose, and the screws were basically completely unscrewed to an extent that the nose iron was loose and could easily move or be moved by a top [sic] or a knock.

Q. In your observation, could you tell whether the nose iron would have moved on its own?

A. No. I could not tell.

Q. Is it nosearm or nose iron?

A. It could be either one. I think I have said both. It should be nose iron.

Q. Would it be usual for a nose iron to be free to move on its own?

A. No.

Q. Why is that?

A. Normally, they are locked down very tightly, and they would also normally be very rusty there. The bolts lock up quite fast.

Q. If the bolts were loose, is it possible for the nose iron to move by itself?

A. If the bolts were loose, yes. It is possible.

Mr. Lashley testified that he worked on the nose arm that day, but that he did not test the scale. It is important to understand here that

the nose arm can be manipulated to change the calibration of the scale to make it weigh lighter or heavier. Mr. Lashley found the screws for the nose arm tightened in such a way as to allow changing the calibration by a tap or a knock. He testified (Tr. 121–23):

Q. The following day, May 23rd, did you, in fact, test the scale or simply work on it?

A. I simply worked on it.

Q. Do you recall exactly what it was that you did to the scale on that date?

A. I made a nose iron adjustment to speed the scale up. That is my terminology. Actually, it was to make it weigh heavier in order to get the proper calibration with the test weights.

Q. Do you recall-- Maybe you can describe just basically what has to be done to get to the nose iron.

A. The nose iron is the part of the mechanical weighing device away from the indication part. It ties to the indication part. It is actually the load-receiving part of the scale. It is one element of the load-receiving part. It transfers the data from the lever system to the indicating element.

Q. When you approach the scale to look at it, can you see this item that is called the nose iron?

A. No, sir. I think that one up there where the nose iron comes to where the indicating element is, I believe there is a cover over the pit there.

Q. Okay. So it would be under the ground level?

A. Yes, sir. It is below ground level.

Q. Would it be under the platform or under the other part of the scale?

A. The nose iron?

Q. Yes.

A. It is actually under the indicating element.

Q. Okay now. How did you get to the nose iron to work on it?

A. Removed the cover and got into the pit, access to the pit.

Q. So you crawled down into the pit?

A. Yes, sir.

Q. Do you recall what condition the nose iron was in at the time you arrived there?

A. On that day, the nose iron, whenever I went to perform the adjustment, there are two locking type bolts. The one main

one is the bigger one. That is the one that normally, you know, holds the nose iron in place. When I went to make the adjustment, these had to be loosened in order to move the nose iron.

In my opinion, it was not as tight as it should have been. I was using a 10-inch crescent wrench to perform this operation, and, you know, there was virtually no pressure.

Q. Were both bolts in the same condition?

A. The top bolt was tight. The bottom bolt was loose.

Q. At that time, what did you do to correct that?

A. At that time, I shortened the length of the lever more or less. That is basically what you actually do. You actually shorten the ratio of the lever, which makes the scale go heavier or weigh heavier.

Q. Did you do anything else to the scale besides make that adjustment?

A. Not that I remember on that date.

Q. Was that nose iron in a condition that in your opinion would allow it to move and let the scale get out of adjustment?

A. Well, it would be hard for me to say. I really couldn't say. That is-- I don't think so. I don't think that it would move.

In summary, respondents' argument concerning the nose-arm maladjustment does much more to harm their case than to help it. Respondents earnestly blame the light weighing (among other reasons) on the nose arm being out of calibration, but this argument is disingenuous, at best, and, in my view, approaches an almost arrogant obfuscation of the facts. Although for the most part deliberately misleading, respondents' argument on the nose arm reveals an intimate knowledge of how to manipulate the fine-tuning calibration of their scale.

The respondents' testimony purports to display respondents as earnestly seeking accurate weights from their scale; yet, none of the many tests conducted in the time period of this proceeding--by private, state or federal experts--ever reveals an accurate scale! Even if one believed respondents' story (which I do not), one is left to wonder why respondents did not just spend the money necessary to upgrade this old scale, or replace it with a new scale, rather than manipulating the nose arm. Respondent Ray Lemons volunteered an explanation, when he revealed that respondents expected their business to be condemned for a new highway. He testified (Tr. 167-68):

Q. Had there been any problems with the scale at the Cumberland City Stockyard prior to August of 1984 that you are aware of?

A. Well, the scales are getting old and needing repairing. I might add this in. They are building a four-lane road through there. This is one reason they haven't put in a new scale. The road comes in three foot of the office. We have tried to keep the scales up and see what effect this would have before we went and spent $8,000 to $10,000 for a new scale.

Notwithstanding these obfuscations, the simple fact remains that check-weight tests on the scale--with no binds evident--show non-repeating errors of light weighing, firmly establishing that the nose-arm calibration is not the explanation for these violations, and I so find.

4. Substantial Evidence of Record Refutes Respondents' Argument (RAB #11, 12, 18-22) that the Center Post of the Scale Rack Was Binding against the Pit Wall during the May 18, 1985, Check-Weight Test.

Respondents argue (RAB #11, 12, 18-22) that the center post of the scale rack was binding against the pit wall on May 18, 1985, which caused the discrepancies in that date's check weighing; however, the large preponderance of the evidence clearly shows that there were no binds on May 18, 1985. In fact, each point of respondents' argument on the averred binding of the center post on May 18, 1985, is refuted by complainant's witnesses.

There is specific, direct testimony by P&S scale expert Mr. Jimmy Thompson, in which he states that respondent Mr. Ray Lemons said (just after Mr. Ray Lemons weighed his last animal, and while he was checking the balance on the scale for Mr. Thompson) that the "post is dragging again," but that he (Mr. Thompson) checked the post, finding no binds in the center post. Mr. Thompson testified (Tr. 43-44):

Q. Okay. After that animal was weighed, what did you do?

A. We checked the balance on the scale. I asked Mr. Lemons to check the balance on the scale. To the best of my recollection, about that time, Mr. Lemons said, "I think that post is dragging again out there."

He went outside, and I followed him outside, and there was a center post that supported the two gates coming off the end of the scale. He kicked or hit at the post.

Q. Before he hit or kicked at the post, did you have an opportunity to see it?

A. Yes, I could see it.

Q. Did you observe that the post was binding in any way?

A. No. It was not.

Q. Did there appear to be clearance between the post and the edge?

A. Yes.

Q. You do not believe that that post would have caused any kind of problem in weighing that animal?

A. No.

Mr. Thompson and respondent Ray Lemons very carefully check-weighed several animals, enough to determine if the weighmaster (Mr. Ray Lemons) was weighing the animals properly on May 18, 1985. It was determined that only 1 of the 21 animals check weighed had been properly weighed by Ray Lemons, *viz.*, the one animal originally weighed in the presence of Mr. Thompson (Tr. 42–43, 50, 61). Mr. Thompson testified that he assured a good zero balance every few minutes during the check weighing, indicating that there was no bind in the scale. He testified (Tr. 55–56):

Q. All right. Tell us about May the 18th.

A. On May the 18th, when we arrived at the market, we checked the zero balance on the scale. Mr. Lemons released the beamlock, and the scale settled on the zero balance. There was no discrepancy. It was on zero.

We started the check-weighing at 9:54. Before we weighed the first animal, we checked the zero, and it was zero balanced. It was in good zero balance condition.

We had four animals out of Pen 39, and they were weighed by Mr. Lemons. After those four were weighed, we checked the zero balance again, or I asked him to check the zero balance, and he did. The zero balance had not changed.

We had eight animals out of Pen 40 that we weighed and completed. At 10:15, we checked the zero balance again. The zero had not changed again. It was still in good zero balance.

Then we selected nine animals out of Pen 42, and these were weighed between 10:15 and 10:22. After the last one, tag number 539, was weighed, we checked the zero balance again. There was no change from the zero balance.

Q. The zero balance repeated every time you checked it?

A. Yes, it did.

Q. Okay. Was the scale operated in a proper manner?

A. Yes, it was.

Q. What causes you to say that?

A. When we arrived at the market, when I asked Mr. Lemons to check the zero balance, he released the beamlock at that point. Watching the indicator, the balance indicator, the scale rose up and down a couple or three times and settled on a zero balance. That as [sic] an indication that there was no bind in the scale. The beam was moving, and it finally settled on a zero balance.

The absolutely crucial thing about respondents' binding argument is that even if respondents proved a bind, which they have not, it would not alter the outcome of this proceeding. This follows because when a scale balances after a draft at zero, even with a bind, and it is a nonrepeating error (none of which has been shown here), it is most unlikely that a nonrepeating error would result in a *gain in weight each time the same animal is put back on the scale.* This analysis is helpful in examining the following respnndents' evidence on this binding point.

Mr. Lashley (respondents' witness) testified, upon "direct" questioning from respondents' counsel, to essentially the same thing to which P&S investigator Thompson had testified (above and in § II(2); to wit, that if a scale is binding, normally it will not repeat zero, and it will not weigh the same animal twice the same way. He testified (Tr. 127):

> Q. So in the instances that we were talking about this morning where this scale did not weight [sic] the same animal at the same weight, and yet, apparently, it zero balanced, that would be unusual, would you say?
>
> A. Yes. Well, would you repeat that, please?
>
> Q. And we are talking about situations where animals were weighed at two different times on the same scale that apparently zero balanced both times, and the weights were different. The general rule is that if a scale will zero balance, it is not in a bind; is that correct?
>
> A. Normally, yes.
>
> Q. Okay. Are there situations or conditions that can occur that will cause that to not be true?
>
> A. Bind-wise, I would say no. Normally, if you have got a bind, the scale will not repeat zero or will not repeat.

Notwithstanding the other witnesses' testimony on this point, respondents' witness (Mr. Terry Lemons) testified that animals would crash into the gate post and it was binding on the scale pit wall on May 18, 1985. He testified (Tr. 148–49):

> Q. What occurred after your initial discussion [with-Thompson]?
>
> A. Well, let's see. I believe he [Thompson] walked back and talked with my father a little bit. Again, if I am not mistaken, I said, "Do you want to start right now?"
>
> He said, "Well, there is no rush."
>
> I think we had some more cattle to come in. But in the meantime, my father had walked out of the scale house and into the alley. He had noticed that the center support post on the scale rack seemed to be binding against the pit wall.
>
> He came and got me and said, "I think this post is kicked out at the bottom. It may be binding a little bit."

So we got a hammer, and I hit it three or four times and knocked it back on the platform. Then, I believe Mr. Thompson walked over into the alley and looked at it and made some comment about that we needed to repair that, or something to that effect.

Then we proceeded to re-weigh the cattle. My father, he re-weighed them, and Mr. Thompson watched. So we went on and re-weighed the pens of cattle that they designated and put them back.

He went on to the office, and we went on with our business. He came back and said, "You have got a bad problem here." He said, "All of your cattle are gaining weight."

Well, I was shocked, and I said, "Well, I can't understand it unless that bind in the scale was causing it."

So he filled out a report, and he said, "You will be hearing from us." Then he left.

Q. Was that the first time that you had problems with that center post?

A. No. On a few occasions before, some animals had jammed up in the door, or a large animal that was a little wild had come out and hit it. It was kind of a narrow door, and if they hit it just right, it would knock it enough to where it would catch on the pit wall some. If you don't pay pretty close attention, you know, it was just kind of resting on it. There is not much tolerance there, and it would rub it.

Q. It would rub on what?

A. It would rub on the scale pit wall.

Later in his testimony, Mr. Terry Lemons testified from a diagram which sought to depict the gate post, which Mr. Terry Lemons testified was catching on the side of the scale pit. Purportedly, the gate post would catch like that often, but Mr. Terry Lemons did not tell P&S investigator Thompson that this was the case. Mr. Terry Lemons testified (Tr. 151):

Q. And that is what this diagram depicts?

A. Yes, that is correct.

Q. Is this the location of the place where the post was pushed out that we talked about earlier?

A. Yes.

Q. And it was actually catching on the side of the pit?

A. Yes.

Q. That occurred that day [May 18, 1985]?

A. Yes.

Q. And is that the first time that had happened with that scale?

A. Do you mean the post getting kicked out at the bottom?

Q. Yes.

A. No. Like I say, it had happened before a time or two, and we would put it back in. The post, like I say, it has been there a long time. It was rotted right at the bottom, and we would nail it and thought we had it repaired, you know. But it had come out on a few other cases.

Q. At any time before that when the scales were looked at or inspected by Mr. Thompson, did you indicate that you considered that a problem with the scale?

A. No. I hadn't said anything about it, no.

At this point in the testimony (Tr. 153) respondents' counsel attempted to introduce into evidence Polaroid instant photographs of the scale, which were properly excluded by the ALJ for a number of correct reasons, which I will not go into here. Suffice it that the pictures and the supporting testimony are in the record for the reviewing court. I only note that RAB #19 avers that these photographs were introduced into evidence. They were not. However, the ALJ properly included reference to them in the transcript, and put them in the hearing record for review.

Mr. Terry Lemons' further testimony was that in his opinion a Hereford bull had run into the gate on both sides that morning (May 18, 1985) and had knocked the post loose, because the scales were checked that early morning and found to have no binds, and this particular bull had been "cutting up" on the scale. Mr. Terry Lemons testified (Tr. 155-56):

Q. (By Mr. Olsen) Mr. Lemons, back to the post that we have been discussing that was rotted off. Do you have any idea at what point it happened that this post was pushed out?

A. Normally, the first thing in the morning, we make a routine check of the scales around the outside edges of the scale to make sure that the scales are not binding. This is done the first thing early when we check for balance on the scales.

In my opinion, we weighed some animals that morning that were wild. We weighed one individual Hereford bull that was real wild. In my opinion, I would say that he was cutting up pretty bad on the scales. When he went off the scales, he hit that gate on both sides. That is when he knocked that post loose.

Q. Is that post visible from the location in the scale house?

A. No.

Q. So at the point that Mr. Thompson arrived and the discussion occurred that morning, that is when you discovered that the post was knocked loose?

A. Yes.

Q. And was that discussed with Mr. Thompson at that time?

A. I believe he walked over there after I hit it with a hammer and knocked it back in place. If I remember it correctly, he made a comment that it needed repairing or something to that effect. I don't remember exactly.

Mr. Terry Lemons' father, respondent Ray Lemons, also was present at the check weighing that morning, and his testimony corroborated his son's testimony, that they had "stock running against" the gate that morning. Mr. Ray Lemons testified (Tr. 169):

Q. Do you recall anything occurring with regard to the scale that day?

A. Well, this post that they have been talking about, they had some problems with it, with stock running against it and making it go out against the wall and drag. They had some problems with that on that day, too. I brought that to Mr. Thompson's attention, too.

Q. Did you know what caused it to be knocking out that particular day?

A. Any kind of animal could have run into it and knocked it out.

Q. Do you recall what was done to correct the problem that day?

A. Yes, sir. Terry went and got a hammer and nailed it back.

No attempt has been made here to refer to every place in the transcript and in respondents' appeal brief where this issue of binding is addressed. However, the portions included are sufficient to display respondents' argument properly. Having accorded due diligence to that end, I now cite two portions of complainant's witnesses' testimony, which specifically rebut any binding of the center post on the scale pit wall on May 18, 1985.

Mr. David Moss, a large-scale inspector from the Tennessee Department of Agriculture, testified that he accompanied P&S Investigator Thompson on May 18, 1985, that Mr. Moss viewed the center post before it was repaired; that it was not binding; that there was approximately three-eighths of an inch clearance between the post and the scale; and that this is proper clearance. He testified (Tr. 198-99):

Q. Mr. Moss, I want to direct your attention to May 18, 1985. On that date, you were at the Cumberland City Stockyard?

A. Yes, sir.

Q. Accompanying Mr. Thompson on his check-weight investigation?

A. Yes, I was.

Q. Did you have an opportunity when you entered the scale area to view the scale?

A. I don't remember whether I specifically viewed the scale upon entering. Whenever there was a question raised as toward the post dragging, I saw the post before any work was done to it.

Q. With regard to the center post, there was testimony from the Respondents that the center post was binding. Did you hear that testimony?

A. Yes, sir.

Q. Did you have an opportunity prior to any repair work being done to view that area of the scale?

A. Yes, I did.

Q. Would you please state whether or not you believe the center post was binding?

A. In my opinion, it was not.

Q. Did you see anything on that scale that would have caused it to bind?

A. In my opinion, no. In my opinion, that was approximately three-eighths of an inch clearance between the post and the scale itself, which is sufficient for proper clearance.

Mr. Thompson, P&S investigator, testified that he viewed the scale before any repair work was done; that it was not binding; that the center post location would have made any binding obvious to anyone operating the gate; and that there was nothing else binding. He testified (Tr. 201-02):

Q. On May 18th, prior to any repair work being done on the scale, did you have an opportunity to view the center post of the scale?

A. Yes, sir.

Q. Was it binding?

A. No.

Q. Did you see anything binding on the scale?

A. No.

Q. Are you aware of whether or not the center post was ever repaired?

A. The center post was repaired when David and I returned on Tuesday-- Let me get my dates right here. On May 22nd, either Robert or Terry one pointed that out, and they had put a metal brace on it. It was repaired.

The gates are attached on the center post with hinges, and it swings from the outside of the scale in. So anybody that was operating this gate and allowing the cattle to come off or any type of livestock, they should have been able to see whether this post was binding or not when they were operating that gate.

Q. There were employees of the stockyard operating the gate?

A. Yes, sir.

Q. And so it would have been obvious to any of those people that the gate post was binding, if, in fact, it was?

A. It should have been. Yes, sir.

Q. But in any event, you viewed the scale before anybody took a hammer to it, and you did not see any binding?

A. No.

Q. And you didn't see anything else binding?

A. No.

Thus, I find that the center post of the scale rack was not binding on the scale pit wall on May 18, 1985.

5. There Is No Evidence of Record that the Scale Was "Bottoming Out" at either the August 11, 1984, or the May 18, 1985, Check-Weight Test.

Respondents argue (RAB #22, 23) that the scale was probably "bottoming out" as a contributing factor to the scale's inaccuracy, but there is no testimony or any other evidence in the record to support this conjecture. In fact, respondents do not *specifically* argue that the scale was, in fact, "bottoming out" during the August 11, 1984, or the May 18, 1985, check-weighing test.

Respondents sought to establish in the record the phenomenon of "bottoming out"; but did not connect it to the actual check-weight test dates. Respondents' witness Mr. Lashley of Systems Scale Corporation described "bottoming out," establishing the *possibility* that a scale could zero balance, yet weigh the same object differently in *seriatim* drafts. He testified (Tr. 127-28):

Q. Let me ask you this. Could you describe for us the meaning of the term "bottoming out"?

A. Well, the term bottoming out, let's say that there is something obstructing the lever system underneath the weigh bridge

to whenever it comes down and hits it, more or less the lever itself stops that, which the indication would more or less stop there.

Q. So would it be possible that a scale would consistently zero balance, and yet bind at a point where it bottoms out?

A. Yes, sir. I have seen then [sic] do it. Yes, sir.

Q. Okay. In that situation, would that be a condition like we were talking about where a scale would not weigh the same object at the same weight, and yet it would zero balance properly?

A. Yes, sir. I have seen them do that.

The implication here is that there is a possibility (an extremely remote one, in my view) of a plausible explanation for the *nonrepeating* errors after a series of good zero balances on the check-weight test dates. Again, there is no testimony in this record to show a bind of this nature on either test date. Thus, this conjectural argument is accorded very little weight.

However, even if I were to assume for the moment that the scale was "bottoming out," it would not help respondents. This follows because, after taking such a leap of faith, respondents would then have me believe that the nonrepeating errors caused by the supposed "bottoming out" resulted in a *gain in weight every time*! This is an incredible argument which, if given any credence, would only serve as a refuge for false weighers.

Respondents' witness, Mr. Lashley, was asked by complainant's counsel if an erratic scale would show nonrepeating errors as a plus error every time, and Mr. Lashley testified that it was very unlikely. He testified (Tr. 139):

Q. If a scale is weighing erratically, and if there is a non-repeatable error, what is the likelihood of the error being a plus error every single time?

A. It is very unlikely.

Mr. Lashley immediately tried to distance himself from that statement (feigning misunderstanding of the question), but after a long and patient cross-examination by complainant's counsel, Mr. Lashley testified, in a different way, to almost the same fact. He would not, however, repeat his comment about the unlikelihood of a plus error every time. He testified (Tr. 139-41) (emphasis added):

Q. If a scale is weighing erratically, and if there is a non-repeatable error, what is the likelihood of the error being a plus error every single time?

A. It is very unlikely.

Q. So that--

A. Let me restate that. It depends on what you are saying. *I don't understand the question.*

Q. Okay. I will see if I can explain it. Counsel for the Respondents has proposed certain circumstances to you to establish that the scale that balances zero still may show erratic weights. Is that right?

A. Yes, sir.

Q. Now what I am asking you is this. Under those circumstances every single time you weighed those animals twice, should you get a plus reading the second time? Do you understand what I am asking you?

A. You are saying that every time you put the same load on it--

Q. I am asking you why it is that every time the animal is put on the second time you get a plus reading.

A. Well, like I say, with no balance changes and with no binding or whatever, it should be repeating. If it is out of callbration, it will repeat the same way.

Q. What about any of those circumstances that you and Counsel for the Respondents discussed wherein the platform was a little bit warped or there was some of these other problems?

A. *I don't understand the question.*

Q. Well, with the same animal getting on every time, would the error be consistent or would it be erratic?

A. It should be erratic if we are talking about what we were talking ahout earlier as far as the scale. The weigh bridge coming down and hitting on a lever and loading it at a different point, or if something was binding or under it, it shouldn't repeat. I would think that it would not repeat the same way.

Q. All right. But in that instance, if you put on 20 steers, what is the likelihood that every time you put a steer on for the second time that it would increase in weight?

A. *I don't understand, really.*

Q. All right. I will start again.

A. You are saying that if you weigh the same steer two or three times, that under normal conditions, he should weigh the same. Is that right?

Q. Well, if tho scale is operating correctly, is that not true?

A. Yes, sir.

Q. I am not saying that the weight indicator is necessarily accurate, but if the scale is operating properly and is loose, and there is no binding, there may be an error, but under those circumstances, the weight error should repeat?

A. At that weight, we are showing no error. We are not saying anything but this particular weight. It should have repeated at this particular weight.

Q. That is what I am asking you.

A. Okay.

Q. So that if that bull, number 534, which weighed 315 pounds when it came into the market, if that steer had been pfoperly weighed and Mr. Thompson put that steer back on the platform and weighed it again, it should have been 315 pounds?

A. *Yes, sir. According to the tests and everything, I would think in my opinion that it should have.*

Q. It might have even lost weight because of shrinkage?

A. I don't know about that.

Q. And that would be true, would it not, in every instance in the 300-pound range that we are talking about?

A. It should be. Yes, sir.

Q. At any time that you viewed this scale, did you see it binding anywhere?

A. No, sir.

There is no question in my mind that this witness understood the import of the question posed by complainant's counsel. Thus, I take as Mr. Lashley's testimony that it is "very unlikely" that consistent plus error readings would occur from an erratic scale which was "bottoming out," and I discount the witness' subsequent attempts to back away from his earlier statement.

Thus, I find that the scale was not "bottoming out," as suggested by respondents and respondents' witness. Moreover, even if the scale was "bottoming out," I find that such an occurrence would not and could not explain the consistent plus weight errors detected on May 18, 1985.

6. There Is No Evidence of Record that the Scale Was "Warped" at either the August 11, 1984, or the May 18, 1985, Check-Weight Test.

Respondents argue (RAB #24, 27) that it is "possible" that the scale was "warped," allowing the scale to repeat zero balance, yet weigh erratically; however, there is no credible evidence of record that the scale was warped on August 11, 1984, or May 18, 1985.

Respondents' witness, Mr. Lashley, testified that it is "possible" that a warped scale could cause the same erratic result as he described for "bottoming out" (discussed immediately above, § II(5)), depending upon where the weight is applied on the platform of the scale. He testified (Tr. 128-29):

Q. Is there another condition where there is flexibility or warp in the platform that could cause the same result [as bottoming out], depending upon where the weight was applied on the platform?

A. If the weigh bridge of the scale is given or deflecting and is close enough to one of these levers, say the transverse lever, which is the center lever that connects the indicating element, if the weigh bridge does come down and hit on this lever, it is going to cause, you know-- What it is actually doing is inducing a load at a different point on this lever, which is, you know, going to change the ratio. It is not actually changing the ratio of that lever, it is loading it at a different point, which would give you a different reading.

Q. So it is entirely possible that a scale would properly zero balance, and if you moved a weight from different location on the platform, and you would obtain three different weights?

A. It is possible, yes.

Q. Do you have any knowledge as to whether the platform of that scale has ever been checked to see whether or not it does have some kind of a flex or warp in it?

A. I think the last test report that was turned in from two other people that worked with our organization, they went up and tested the scale. I think they made a notation on that report that the I-beams were rusted and not in good condition.

Q. Would that test have occurred in February of 1986?

A. Yes, sir.

This argument--the scale was warped--is virtually identical to the argument concerning "bottoming out," addressed above in § II(5). The only difference is that respondents argue that a February 1986 scale examination by Mr. Lashley's company, which purportedly discovered rusty I-beams in the scale, should prove the *possibility* of warp in the scale.

Again, as in the preceding § II(5), the implication is that the *possibility* of warping explains the light weighing. I reject this approach for the same reasons as I rejected the "bottoming out" argument, above. There is no testimony or other evidence in this record to show a warp in the scale on either test date. The condition of the scale in February 1986 is not at issue here, and the testimony by Mr. Lashley that this might show warp in the scale is accorded very little weight, especially inasmuch as the testimony would attempt to explain the repeated plus errors in the scale on the test dates, i.e., the repeated obtaining of greater weights on reweighing.

In fact, the same tedious details from the record (Tr. 139–41) could be recited here to turn away respondents' contention that the possibility

of warp explains the detected light weighing, but since they are set forth in § II(5) above, I will not repeat them here.

Thus, I find that there is no evidence in this record that the scale was warped on either of the test dates, and even if there was warp, which there was not, such a warped condition would not explain the consistent plus errors detected by P&S investigators.

7. There Is No Evidence in the Record Which Shows that Placement of Weights on a Rusty Scale (Corner Tests), or Dirt and Sawdust in Levers (RAB #7, 23), Caused the Misweighing Detected by P&S Investigators on May 18, 1985.

Respondents rely on a February 1986, scale test by Systems Scale Corporation to argue (RAB #17, 23) that rusty I-beams or sawdust and dirt in the levers *could* have caused inaccuracies in the May 18, 1985, check weighing, but there is no evidence in the record that the scale levers were obstructed by sawdust or dirt, or that rusty I-beams affected the outcome of the test on May 18, 1985.

Initially, I find that the condition of the scale in February 1986 has very little to do with the May 18, 1985, check-weight test, and can be accorded very little weight. Moreover, even if this anachronistic argument were considered appropriate, which it is not, the above scale conditions alleged *possibly* to exist in May 18, 1985, would not explain the light weighing detected on that date.

Respondents' witness, Mr. Lashley, testified from the February 1986 Systems Scale Corporation report (RX 2) that a corner test detected problems, and the corner test was stopped to clean out the sawdust and dirt. The impact of this testimony is that a scale could show a zero balance, but because of obstruction by rust, dirt and sawdust, weigh inaccurately, depending upon where the animal was placed upon the scale. Further, this kind of obstruction could cause the scale to be operating properly with zero balance, yet not be weighing correctly as far as calibration. Mr. Lashley testified (Tr. 132–33; and see CX 2) (emphasis added):

> Q. Looking at the report, can you tell us what was done at that time?
>
> A. Looking at the report, I would say that they had a problem in the corners when they did their corner test. It actually stipulates that they stopped the test, found dirt and sawdust under the levers, cleaned out and retested. Then it shows that they did do another corner test.
>
> . . . .
>
> Q. So what you have determined from that report is that *variation was obtained when weights were placed in different corners of the scale*?
>
> A. From what they have recorded here, I would say that *they did have problems in the corners of the scale*.

. . . .

Q. (By Mr. Olsen) Mr. Lashley, with your experience with this particular scale, do you have an opinion as to whether it would be possible that *under certain circumstances a different weight might be obtained of a particular object, depending upon where that object, generally an animal, was located on the platform of the scale?*

A. *Yes, sir.* Like we said, when you test the corners and have corner errors, you are going to have a difference in weight depending upon where the load is applied to the scale.

Q. And even with that condition, it would be most likely that the scale would appear to be operating properly with zero balance, and otherwise appear to be operating properly?

A. Yes, sir. This brings us back to the fact that *zero balance can be zero balance and the scale not be weighing correctly as far as calibration.*

Mr. Lashley's testimony supports respondents' proposition as far as it goes, but it does not support respondents' ultimate position that alleged obstructions would explain *consistent* light weighing on May 18, 1985. Obstructions would not explain a gain in weight on check weighing each time the same animal was put back on the scale (except for the one animal originally weighed in front of the P&S investigator).

Both the Federal and State witnesses testified that the purpose of check weighing is *not* to determine the *accuracy* of the scale (respondents' main point here), but to determine whether the weighmaster is weighing *properly*. Thus, if a scale is not binding and is repeating zero, then the scale may not be accurately calibrated, but any malfunction should repeat the error (or weigh less) on subsequent weighing of the same weight. Mr. Thompson testified (Tr. 70–72) (emphasis added):

Q. If check-weighing, the purpose of check-weighing, is not to show the accuracy of the scale, what is its purpose?

A. *Check-weighing investigation is designed to see if the weigh-master is weighing properly.*

Q. What kind of test is performed to check the accuracy of the scale?

A. To test the accuracy of a scale, you have to put calibrated weights on the scale and determine if you are getting the proper indications on it. *There is no way that you can determine the accuracy of a scale by doing check-weighing.*

Q. Does the Packers and Stockyards Administration conduct scale testing?

A. No. We have a cooperative agreement with the states. The states and/or private testing companies will conduct the scale tests.

Q. The scale test that was performed at the Cumberland City Stockyard on *May 22nd by State of Tennessee officials*, was that conducted at your request?

A. Yes, it was.

Q. And you requested it because of the check-weighing investigation on May the 18th?

A. Yes.

Q. *Generally speaking, if a scale is malfunctioning, but if it shows a repeated zero balance and the scale is floating free without any obvious binds, does that indicate to you that the scale is weighing accurately*?

A. It *can't indicate that the scale is weighing accurately if you don't have test weights. It could indicate that it should repeat, the weight that you have placed on it* previously if you tried to weigh it again.

Q. So *that even if the scale is malfunctioning, under those circumstances, it would be a repeatable malfunction*?

A. *Yes. It should be a repeatable malfunction. Yes, sir.*

Thus, it is clear that P&S was not even attempting to determine the *accuracy* of the scale at the May 18, 1985, check-weight test. Mr. Thompson requested the State of Tennessee scale inspector, Mr. Moss, to test the scale after the May 18, 1985, check-weight test. Mr. Moss corroborated Mr. Thompson's testimony on this point by testifying that he tested the scale's calibration of May 22, 1985, that the scale repeated a zero balance, that the scale was weighing light by 10 pounds *on all four corners*, that the scale was floating free, that the scale was not binding, and *that the scale was repeating its indications*. He testified (Tr. 88-89):

Q. Did you-- Would you please discuss how you conducted your test on that date [May 22, 1985]?

A. I tested this scale using 20 pounds of balance weight on it, which our standard procedure is that we will use either 15 or 20. It doesn't really matter. The scale is balanced to zero at any rate.

On this particular test, the SR [Sensitivity Rating--the lowest weight which registers on a scale (Tr. 81, 105)] tested to be six pounds, which was still acceptable. We proceeded to the corner test, where the scale tested to be weighing light by ten pounds.

Q. Is that acceptable tolerance?

A. No, it is not.

Q. What did you do when you found that all four corners were registering light?

A. We took the weights off the scale and checked for balance. Then I rejected the scale.

Q. Did you inspect this scale on that date?

A. Yes, I did.

Q. Did you observe any obvious physical impairment?

A. No, I did not.

Q. The scale was floating free?

A. Yes.

Q. There was no binding?

A. No.

Q. Was it repeating its indications?

A. Yes.

Thus, I find respondents' argument, based upon the February 1986 scale test by Systems Scale Corporation, to be of very little merit, both because the test was performed long subsequent to the check-weight test of May 18, 1985, and because, even if the argument was correct that rust, dirt and sawdust affected the corner weights of the scale, the discrepancies would not explain a gain in weight on check weighing each animal.

III. Auction Houses Have Innate Reasons to Short Weigh.

Respondents contend on appeal that respondents had no reason to short weigh, that respondents would get only $7 per head regardless of weight, that respondents would not benefit in any way by light weighing the cattle, and that light weighing would even hurt respondents by driving sellers away. (RAB at 18).

These arguments are without merit. It is well-settled that auction houses have innate reasons to short weigh, and that careless or deliberate false weighing is an unfair and deceptive practice. Both the literature and the Department's cases are quite specific that short weighing, *inter alia*, harms competing markets by taking potential sellers from them, deprives sellers of their correct full payment for their livestock, and induces packers to pay more per pound or not deduct for shrinkage, because of higher yields on short-weighed livestock.

For instance, in Campbell, *The Packers and Stockyards Act Regulatory Program*, 1 Davidson, Agricultural Law 269-70, 271 (1981 and 1986 Cum. Supp.), it is stated:

> False weighing is not only unfair to the livestock sellers who are short-weighted but also to competing markets, since false weighing may draw buyers (who know of the favorable weights) from competing markets, and buyers who know of the favor-

able weights may pay a little more per pound for the livestock, thereby attracting additional sellers.[463]

[463] *In re* Muehlenthaler, 37 Agric Dec 313, 321, *affd mem*, 590 F2d 340 (8th Cir 1978); *In re* Cordele Livestock Co, 36 Agric Dec 1114, 1133 (1977), *affd per curiam*, 575 F2d 879 (5th Cir 1978); *In re* Loretz, 36 Agric Dec 1087, 1095 n 5 (1977); *In re* Townsend, 35 Agric Dec 1604, 1622 (1976); *In re* Overland Stockyards, Inc, 34 Agric Dec 1808, 1819 (1975); *In re* Worsley, 33 Agric Dec 1547, 1577 n 24 (1974); *In re* Trenton Livestock, Inc, 33 Agric Dec 499, 526 n 24 (1974), *affd mem*, 510 F2d 966 (4th Cir 1975); *In re* Speight, 33 Agric Dec 280, 317 n 24 (1974).

. . . .

Although the agency does not have to prove the motive for false weighing, a dealer who sells livestock to packers based on the dealer's purchase weights has a motive for short weighing. Packers are well aware of the yields they get from livestock, and if they get favorable yields because of a dealer's short weighing, they might pay more per pound or not deduct for excessive shrinkage.[474]

[474] *In re* Muehlenthaler, 37 Agric Dec 313, 321, *affd mem*, 590 F2d 340 (8th Cir 1978); *In re* Livestock Marketers, Inc, 35 Agric Dec 1552, 1557-58 (1976), *affd per curiam*, 558 F2d 748 (5th Cir 1977), *cert denied*, 435 US 968 (1978); *In re* Trenton Livestock, Inc, 33 Agric Dec 499, 526 n 24 (1974), *affd mem*, 510 F2d 966 (4th Cir 1975); *In re* Speight, 33 Agric Dec 280, 317 n 24 (1974).

Moreover, even slight false weighing is a serious violation of the Act, is one of the most deceptive practices under the Act, and is virulently anti-competitive. A succinct description of just how short weighing can be utilized for unfair competitive advantage appears in *In re Overland Stockyards*, 34 Agric. Dec. 1808, 1843 n.24 (1975) (emphasis added):

> However, even slight false weighing is a serious violation of the Act. The cumulative effect of 10 to 20 percent of the livestock in the country being short-weighed even by a small amount is an unwarranted burden to the livestock industry which should be significantly reduced. False weighing, at times, is used as an unfair competitive practice, rather than (or in addition to) being a means of underpaying the seller. As stated in *In re Kenneth W. Miller*, 33 Agriculture Decisions [88], P & S Docket No. 4721, decided December 7, 1973:
>
> > Mr. Matteson, Area Supervisor for the Arlington Area Office, which encompasses the State of North Carolina, testified that short-weighing is a problem in

> the livestock industry. It is one of the most deceptive practices under the Packers and Stockyards Act. The producer or farmer who sells livestock looks to the price he will receive. He assumes the scales are tested and accurate and that his livestock will be weighed correctly. He will therefore sell his hogs to the buyer who will pay him the highest price. A buyer who short-weighs livestock is able to offer a few cents more per pound since he is paying it on a weight that is less than the actual weight of the livestock. The buyer who short-weighs livestock therefore has an unfair means of perpetuating himself in business at the expense of his competitors who weigh livestock accurately.
>
> The evidence shows that in several instances Mr. Miller *sold the hogs* to H. P. Beale and Sons *at the same weight he had purchased them from Mr. Stephens. At first blush this may indicate that respondents did not benefit when they short-weighed the livestock, but this is far from true.* It is a common practice in the industry for a buying station and packer to have an agreement as to shrink. It is common that the packer will allow a 2 or 2-1/2 percent shrink or weight loss during shipment from the buying station. If the shrink exceeds this amount the packer will bill the buying station back for the excess loss. If the shrink is consistently over the allowed percentage, a packer would probably look for another buying station from which to buy his hogs. *A dealer who short-weighs hogs when he buys them and then sells them on his purchase weight is eliminating his shrink to the packer.* The packer gets a high yield hog on slaughter and the buying station gets a satisfied customer and sure market for his hogs.

Notwithstanding respondents' protestations to the contrary, they had plenty of reasons to short weigh, and regardless of their motives (which do not have to be shown by the Department), the very act of short weighing-- whether intentional or careless--violates the Act. In fact, Mr. John T. Lacy, Chief of the Scales and Weighing Branch, Packers and Stockyards Administration (P&S), pointed out several possible reasons for respondents' misweighing. If respondents' knew that they were going to buy the livestock themselves or if they already owned the livestock, they might misweigh. But, generally, P&S believes that stockyards short weigh to provide an advantage to sellers, to encourage business and to stimulate prices. This attracts consignments in spite of lower commissions, and even offsets lower commissions. Mr. Lacy testified (Tr. 95-96):

> Q. What might cause a market to misweigh livestock?
>
> A. There are several potential reasons for an auction market to misweigh livestock. They would or could possibly, if they

knew they were going to buy the livestock themselves, or if they owned the livestock themselves when it was consigned into it, they could misweigh it to receive some advantage.

> Additionally, and generally we feel this is the case, short weighing of livestock could provide an advantage to the sellers to encourage them to patronize the market and to stimulate the pricing, which, in turn, will attract consignments. We find this even at markets with percentage tariffs, where the fact of the short weighing results in a slightly less return of commission to them; but, apparently in those cases where this is done, it is more than offset by the advantages which accrue from the potential increase in consignments.

Thus, I find respondents' argument that they had no reasons to short weigh to be without merit.

IV. Since Respondents Received a Prior Warning Letter, with an Opportunity to Achieve Compliance, Willfulness Is Not an Issue in This Case.

Respondents argue that complainant has "failed to prove willful violations." (RAB, § IV, at 20-21). However, although I have adopted the ALJ's finding or conclusion that respondents' violations were willful (Initial Decision at 7-8), willfulness is not an issue in this case. (See *In re Upton*, 44 Agric. Dec. ____, slip op. at 10-12 (Oct. 2, 1985)).

Under the Administrative Procedure Act, if a warning letter has not been sent to the respondents, a suspension order cannot be issued unless the violations were willful. Specifically, the Act provides (5 U.S.C. § 558(c)):

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

In the present case, respondents received a prior warning letter, with an opportunity to achieve compliance with all lawful requirements. On August 21, 1984, about 9 months prior to the violations involved here, Jack D. Ballew, Jr., Regional Supervisor of complainant's Memphis office, sent the following letter to respondents (CX 11, p. 1), which was received on August 23, 1984 (CX 11, p. 2):

> On August 11, 1984, representatives of this office, with the assistance of your employees, reweighed 16 calves before your sale. The calves were to be sold by weight and the accounting made to your consignors on that basis.

> Our investigation revealed that the calves were not weighed accurately. These weight discrepancies were discussed with you at that time.
>
> As you are aware, weighing livestock inaccurately is a violation of the Packers and Stockyards Act. That Act makes you responsible for accurately weighing livestock consigned to your market for sale. We request that you review the enclosed instructions for weighing livestock with your weighmaster and take the necessary action to insure accurate weights. Please advise this office within 15 days what action you have taken to improve your weighing practices.
>
> If similar discrepancies are found in the future, it may be necessary to initiate administrative proceedings which could lead to suspension of your registration under the Packers and Stockyards Act.
>
> If you have any questions about our checkweighing program, please feel free to contact this office at any time.

Since respondents received written notice of their weighing practices which might warrant a suspension order and were given the opportunity to demonstrate or achieve compliance with all lawful requirements, it is not necessary to find that their violations here were willful, in order to suspend their registration.

V. The Sanction Imposed Herein Is Entirely Appropriate to the Circumstances of This Proceeding.

Although respondents raise several arguments against the sanction imposed herein, the sanction herein is entirely appropriate to the circumstances of this case.

Respondents argue (RAB, § III, at 19–20) that the ALJ did not properly consider the "gravity" of respondents' actions, that this is not a case of deliberate, intentional false weighing, that the ALJ improperly did not consider that this sanction would also suspend the Paris (Tennessee) Livestock Sales operation for 90 days, that the civil penalty of $10,000 is counterproductive in that the $10,000 would be better spent on a new scale, that the suspension of 90 days is "out of line" with the usual 30- to 45-day suspensions ordered in intentional short-weighing cases prior to 1984, that the $10,000 civil penalty unfairly, and without supporting evidence, assesses the maximum penalty per offense in this type of case, that the ALJ improperly did not mitigate the sanction with the evidence of mechanical scale malfunction and the "excellent" reputation of respondents, that the ALJ's sanction is unfairly severe, and that the sanction should only apply to the Cumberland stockyard.

All of these arguments, each and every one, have been carefully considered and are found to be without merit. There will be some analysis of these arguments, but the fact is that such arguments are routinely

raised in these types of cases and are routinely rejected. For instance, the ALJ properly and specifically considered the "gravity" or seriousness of the respondents' actions and found false weighing to be "an extremely serious violation" (Initial Decision, Finding 14, at 15). And, in the *Sanction* portion of his Initial Decision, he also called false weighing "a serious violation" (Initial Decision at 15). Moreover, the ALJ points out that it is Departmental policy "to impose severe sanctions for serious violations of the Act" (Initial Decision at 15).

Although I infer that respondents' false weighing was deliberate, [5] respondents' argument that their actions herein were not deliberate or intentional is of no moment, because "willfulness" is not an issue in this case (see § IV, above), and the Department imposes severe sanctions for violations regarded by the administrative officials and the Judicial Officer as serious irrespective of whether the conduct was deliberate or intentional. See *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 248, 250–51 (Mar. 19, 1987), *appeal docketed*, No. 87–7189 (9th Cir. Apr. 27, 1987).

Respondents attack the $10,000 civil penalty portion of the sanction both as too severe, because it appears to be the maximum allowable amount for one violation, [6] and as counterproductive, because the $10,000 could be better used to buy a new scale. These arguments do not alter the operation of the statutory requirements (7 U.S.C. § 213(b)), which were closely followed by P&S investigator Mr. John T. Lacy (Tr. 101–02). He testified that the agency is required to consider the gravity of the offense, the size of the business, and the ability of the operation to continue in business after the imposition of the sanction. He testified (Tr. 96–97):

> Q. Are you aware of what sanctions the Packers and Stockyards Administration would like to see issued against the Respondents?
>
> A. I am.

---

[5] Twenty of the 21 animals check weighed on May 18, 1985, were originally weighed out of the presence of the P&S investigator, and then check weighed in the presence of the P&S investigator. All 20 weighed heavier on the second weighing. Although there is no basis here for an argument that the scale was weighing erratically, with a nonrepeatable error, if the scale were weighing erratically, with a nonrepeatable error, the statistical probability of a chance happening of all 20 animals weighing heavier on the second weighing would be 1 in 1,048,576 (*In re Saylor*, 44 Agric. Dec. ____, slip op. at 99–101 (Sept. 20, 1985) (decision on reconsideration)), since the chance of each individual animal weighing heavier would be 1 in 2, leaving aside shrinkage, which, if considered, would make the odds of such a chance happening even more remote.

[6] Each animal short weighed was short weighed separately and, therefore, each instance of short weighing an animal is a separate violation.

Q. Would you please state for the record what that sanction would be?

A. We ask that the registrations of the Respondents be suspended for a period of 90 days, and that they be assessed a civil penalty in the amount of $10,000.

Q. Did you participate in any decision to recommend this sanction?

A. I did.

Q. Are you aware of the factors which were considered by the agency in making this recommendation?

A. Yes, I am.

Q. Would you please state for the record what these factors were?

A. With regard to the imposition of a civil penalty, there are statutory requirements that we must consider. They include the gravity of the offense, the size of the business and the ability of the operation to continue in business after the imposition of the sanction.

These criteria were properly applied by the agency (Tr. 97–102) and were duly found as such by the ALJ (Initial Decision, Findings 14–16). Thus, the arguments against the $10,000 civil penalty are not meritorious.

Likewise, respondents' argument that the sanction is not appropriate because it also will operate to close the Paris (Tennessee) Livestock Sales operation for 90 days is also without merit. This follows because complainant adduced evidence to show that careful consideration was given to this issue by P&S investigators, commensurate with the deterrent effect sought. The sanction must be sufficient to deter not only respondents from false weighing, but also others in the area who may learn of it. Mr. Lacy testified (Tr. 100):

Q. Okay now. Aside from the gravity of the offense, the size of the business and the ability of the firm to continue in business, what other factors were considered by you?

A. We look at the availability of other marketing outlets for the producers in the area. We also consider the deterrent effect that would result from the imposition of a sanction. We are desirous that the sanction be sufficient to provide a deterrent, not only to the Respondents in this particular case themselves, but also to others who may learn of it and who may be so inclined to short weigh livestock themselves in the future.

Q. Are there other markets available to the producers in the area served by Cumberland City Stockyard?

A. I believe there are at least four within a 50-mile radius of Cumberland City, not including the facility at Paris, Tennessee.

Based upon their analysis of the above-listed criteria, the P&S investigator determined that a *6-month suspension* would be appropriate in this circumstance. However, because respondents also operated at Paris, Tennessee, the agency decided to recommend instead 90 days' suspension at both facilities. Mr. Lacy testified (Tr. 100-02):

> Q. What effect would the imposition of a sanction at Cumberland City Stockyard have on the facility at Paris, Tennessee?
>
> A. We would be suspending the Respondents from operating in any capacity subject to registration and bonding of the Packers and Stockyards Act. It would, therefore, result in a suspension of activities at the Paris, Tennessee, facilities also.
>
> Q. Was this factor considered in making your recommendations for sanctions?
>
> A. Yes, it was. If it did not involve both markets, and considering the fact that we did conduct the weighing investigation at Paris, Tennessee, disregarding the close proximity to the investigation at Cumberland City, they could have expected us at Paris. We don't know. We are taking that kind of at face value. That weighing investigation at Paris, Tennessee, disclosed accurate weighing.
>
> On that basis, the suspension that we are asking is half of what we would have asked, had the suspension that we are seeking been intended to apply only to the Cumberland City Stockyard.
>
> Q. So what you are saying is that were you recommending the sanction solely for Cumberland City, you would have recommended six months' suspension?
>
> A. That is correct.
>
> . . . .
>
> Q. Mr. Lacy, you indicated in your first item on your list of factors the statutory requirements. Can you tell me what those are?
>
> A. It is contained in Section 312(B) of the Packers and Stockyards Act, and it deals with the imposition of a civil penalty. I can't state it verbatim.
>
> Q. Is that the only section?
>
> A. With regard to civil penalty. The authorization for suspension is contained in U.S.C.-- It is 7 U.S.C. 204, I believe, which is incorporating the Packers and Stockyards Act.

Thus, it is clear that the ALJ was on solid ground when he opted for the P&S-recommended suspension of the registrants for 90 days, which operates to close both facilities for 90 days. This suspension order best serves the aforementioned purposes of the Act.

Respondents' argue that the sanction is too severe, and should have been mitigated because respondents adduced evidence both that the

scale was mechanically malfunctioning and that respondents enjoy an "excellent" reputation. But, neither point supports mitigation of the sanction. Respondents did not prove mechanical malfunction, at least, not in a way which would support their case. Moreover, respondents' reputation in the community does not mitigate here, because the very nature of the offense does not lend itself to discovery by the layman.

In fact, even if respondents' earlier transgressions were known to respondents' character witnesses, and they testified anyway that integrity resides in the respondents, it would still not mitigate, both due to the difficulty in detecting the offense and the extremely serious nature of the false weighing herein. Mr. Lacy of P&S testified to both of these points, e.g., the gravity of the offense and the difficulty of a layman in detecting false weighing, as follows (Tr. 97-98):

> Q. Let's look at these one at a time, if you would. You said the gravity of the offense. The Respondent is accused here of false weighing of livestock. What is the agency's view with regard to whether or not his particular violation is grave?
>
> A. The agency considers false weighing of livestock to be a very grave offense, and in particular with regard to a livestock auction where consignors rely upon their trust of the market agent to represent their best interests in the handling and sale of the livestock. Where the short weighing takes place, then the market fails in this fiduciary responsibility to represent their best interests.
>
> So this not only violates the trust, but, in addition, the consignor ends up taking less money home with him from the sale.
>
> Q. Generally speaking, is there any way for a farmer or a rancher to verify that he or she is receiving an accurate weight?
>
> A. If the person is knowledgeable in weighing, and if the person were inclined to closely observe the weighing operation, including the verification of the zero balance condition prior to the weighing, it would be possible for them to determine that the weighing operation was, in fact, correct.
>
> Absent that, and, I might add, people are just not generally inclined to pay this close attention. Rather, they rely upon their trust of the person they are selling to. Absent that, they don't have the opportunity to know what the weight actually is, generally, within certain limits.

Finally, respondents' argue that the 90-day suspension is "out of line" with the usual 30- to 45-day suspensions ordered in similar cases prior to 1984. Implicit in this argument is that the ALJ was "unreasonable" in ordering such a "severe" (90-day) suspension period. This argument is without merit. The sanction is reasonable in these circumstances.

A reviewing court should not determine if the administratively-imposed suspension is "reasonable" based upon what the court itself would have imposed. Rather, the court should follow the standards of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)).

The recently-decided case of *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 204-10 (Mar. 19, 1987), *appeal docketed*, No. 87-7189 (9th Cir. Apr. 27, 1987), succinctly states the applicable principles of court review. Moreover, the *Spencer* decision also sets forth specific facts and cases rebutting respondents' contention that 30 to 45 days is the "usual" duration of a suspension order in these types of cases. Most important in this regard is the cited case of *In re Worsley*, 33 Agric. Dec. 1547, 1584-92 (1974), which contains a table demonstrating that from 1950 to January 1974 the maximum suspension for short weighing was 5 years, the *average was 245 days*, and the *median was 90 days*. In more recent years, the sanctions imposed under the Packers and Stockyards Act have been *much more severe*. This announced severe sanction policy has been expanded and is set forth in *Spencer* (reproduced as Appendix C, herein). The portion of *Spencer* addressing these issues is as follows (*In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 204-10 (Mar. 19, 1987), *appeal docketed*, No. 87-7189 (9th Cir. Apr. 27, 1987)):

> If reviewing courts throughout the country were free to hold that any suspension period imposed by the Judicial Officer is not "reasonable" if it exceeds (or exceeds by a substantial amount) that which the reviewing court would have imposed, it will destroy not only the desired nationwide uniformity, but, also, at times, important regulatory programs (due to the court's lack of familiarity with the total administrative program).
>
> For example, in *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109 (8th Cir. 1972), *rev'd*, 411 U.S. 182 (1973), the Eighth Circuit set aside as "unconscionable" (454 F.2d at 115) a 20-day suspension order issued against an auction market for short weighing livestock on February 25, 1969, after the auction had been warned about prior short weighing in 1966 and 1967. If the Eighth Circuit's decision had not been reversed, it would have totally destroyed the agency's check-weighing program throughout the country. In fact, if the Secretary could issue no more than a cease and desist order when false weighing was detected after two prior warning letters, it would have been prudent for the agency to completely discontinue any effort at check weighing, using the agency's limited money and manpower in other areas. Registrants under the Packers and Stockyards Act fear a cease and desist order about as much as they would fear a slap across the face with a wet noodle! The Eighth Circuit's decision, if not reversed, would have made it cost-effective to run the risk of a cease and desist order for short weighing. And when short weighing is practiced by one auction market in an area, it attracts volume from other mar

kets, which leads to short weighing by other markets in the area to hold their volume. [55]

[55] *In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

I am confident that the Eighth Circuit had no idea that its decision would totally destroy the agency's check-weighing program. It had little knowledge of the weighing problem in the livestock industry (see *In re Muehlenthaler*, 37 Agric. Dec. 313, 331-32, 353-69, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978)), and the Department's check-weighing program. It is quite likely that the court was aware of only "four [prior] decisions of the Secretary in which suspensions of registration [were] imposed for short-weighing consigned cattle" (454 F.2d at 114). As a matter of fact, suspension orders in short-weighing cases had previously been issued by the Judicial Officer in 148 cases during the prior 25 years, with suspension periods of 5 years (1 case), 4 years (2 cases), 3 years (6 cases), 30 months (1 case), 2 years (6 cases), 20 months (1 case), 18 months (6 cases), 16 months (2 cases), 15 months (2 cases), and 1 year (15 cases). Hence prior suspension orders of a year or longer had previously been issued for short weighing in 42 cases by the Judicial Officer during the 25-year period preceding *Glover*. A table listing the suspension periods imposed for false weighing or causing false weighing of livestock from 1950 to January 1974 is set forth in *In re Worsley*, 33 Agric. Dec. 1547, 1584-92 (1974). The table is summarized in the decision in that case (*id.* at 1576). The maximum suspension for short weighing was 5 years, the average 245 days and the median 90 days (*id.* at 1575-76). All but the last 12 of the 160 cases listed in the table were decided by the Judicial Officer prior to the Eighth Circuit's decision in *Glover*.

We do not know whether the Eighth Circuit would still have regarded the 20-day suspension in *Glover* as "unconscionable" if it had known of the 148 prior cases during the preceding 25 years in which the median suspension period was about 90 days. Presumably, the Department's appellate attorneys regarded the citation of four prior precedents involving 30-day suspension orders as sufficient to support the 20-day suspension order involved in *Glover*. (It is not feasible within the limited confines of an appellate brief to fully educate each reviewing court as to the totality of facts bearing on an administrative sanction).

If the congressional purpose of this remedial legislation is to be achieved, and if any degree of national uniformity in sanctions is to be achieved, reviewing courts must not determine whether an administratively imposed suspension period is "reasonable" based on what suspension period they would have imposed. Rather, they should reverse only if the administrative sanction fails to meet the standards of the Administrative Procedure Act, i.e., if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706(2)(A)). And it goes without saying that an administrative suspension period that greatly exceeds that which would have been imposed by the reviewing court is not necessarily arbitrary, capricious, or an abuse of discretion.

Respondents contend that the statutory criteria for determining the amount of a civil penalty under the Act (7 U.S.C. § 213(b)) should be read into the suspension provisions in 7 U.S.C. § 204 (Appeal Brief at 48). That same argument was rejected in *In re Saylor*, 44 Agric. Dec. ____, slip op. at 497 (Sept. 20, 1985) (decision on remand), in which it is stated:

> Whether an 8-month suspension order will affect respondent's ability to continue in business as a livestock dealer is irrelevant in this proceeding. In the case of civil penalties imposed under the Act, the statute requires that ability to continue in business be considered (7 U.S.C. § 213(b)) (see § XIX(C), *infra*). However, no such requirement is imposed by Congress with respect to suspension orders (7 U.S.C. § 204). When a provision is carefully included in one section of a statute, and omitted in another section, it should not be implied in the place at which it is omitted. *Lang* v. *Comm'r of Internal Revenue*, 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co.* v. *Benson*, 232 F.2d 554, 562 (2d Cir. 1956).

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Saylor*, 44 Agric. Dec. ____, slip op. at 498-520 (Sept. 20, 1985) (decision on remand), which is set forth with a clarifying change and some expansion in subsection C, *infra*. [56] Considering respondents' repeated and flagrant violations of their fiduciary obligations in the light of their previous history of similar violations (subsection A, *supra*), the 10-year suspension period recommended by complainant and imposed by the ALJ is "reasonable."

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[56] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, In *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir.

1987); *In re Callier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gald Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nam. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cardele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzara*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trentan Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Although the 10-year suspension period imposed here is twice as long as the longest suspension period previously imposed in a litigated case, 10-year sanctions have been imposed in a number of recent consent or default cases. *In re Ozark County Cattle Co.*, 45 Agric. Dec. ____ (Oct. 15, 1986) (consent order) (10-year suspension for failure to pay for livestock and check kiting); *In re Palmer*, 45 Agric. Dec. ____ (June 23, 1986) (default order) (10-year suspension to be reduced to 120 days if respondent makes full payment for $103,962.37 worth of livestock); *In re Corporate Capital Co.*, 45 Agric. Dec. ____ (Jan. 10, 1986) (consent order) (10-year prohibition from operating subject to Act because of failure to pay for livestock, misrepresenting buying commissions and collecting from sellers on the basis of false representations). Consent and default decisions are not regarded as precedents in determining the sanction in litigated cases, but these consent and default cases reflect the administrative determination that 10-year sanctions can, in appropriate circumstances, be reasonable.

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g.*, [*In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. ____ (Apr. 13, 1987) ($50,000 civil penalty); *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987), *appeal docketed*, No. 87-7189 (9th Cir. Apr. 27, 1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases);] *In re Welch*, 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re*

Garver, 45 Agric. Dec. ____ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. Nov. 28, 1986) (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision*, 44 Agric. Dec. ____ (Oct. 24, 1985) ($10,000 civil penalty); *In re Powell*, 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. ____ (May 28, 1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

In *In re Garver*, *supra*, 45 Agric. Dec. ____, slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60-day suspension orders would have been issued in comparable cases a few years ago.

Thus, it is quite clear that the Packers and Stockyards Administration very carefully fashioned the sanction herein to fit the circumstances of respondents' actions, and that the ALJ appropriately adopted the sanction.

Finally, although no attempt has been made by the Judicial Officer to cite and address every argument raised by the respondents herein, all respondents' arguments have been carefully considered.

For the foregoing reasons, the following order should be issued. [7]

Order

Respondents Robert E. Parchman, Virgil R. (Ray) Lemons, and Jack E. Hamilton, their successors, officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights;

[7] This is one of a group of cases that has been unreasonably delayed in the office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

2. Paying the sellers of livestock on the basis of false and incorrect weights;

3. Collecting from the purchasers of livestock on the basis of false and incorrect weights;

4. Failing to maintain and operate livestock scales owned or controlled by the respondents in such manner as to insure accurate weights or otherwise failing to weigh livestock in strict conformity with the requirements of § 201.73-1 of the regulations;

5. Making or issuing or causing to be made or issued, false, incorrect, or inaccurate entries in scale tickets, invoices, or any other documents evidencing or prepared in connection with the purchase or sale of livestock;

6. Issuing or causing to be issued invoices or any other documents prepared in connection with the purchase or sale of livestock which fail to show the true and correct weights of such livestock and all other facts necessary to show clearly and completely the true nature of the transaction; and

7. Collecting or aiding and assisting any person to collect from the purchasers of livestock on the basis of false, incorrect, or inaccurate invoices or accountings.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including copies of scale tickets which show the correct weight of livestock, the time of balance, the address of the market, and the initials of the weighmaster.

Respondents are suspended as registrants under the Act for a period of 90 days.

In accordance with § 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of $10,000. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondents.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order.

APPENDIX A

Pertinent Statutory Provisions

7 U.S.C. §§ 204, 205, 208, 213, 221

APPENDIX B

Pertinent Regulations

9 C.F.R. §§ 201.43, .49, .55, .71, .73, .73-1

APPENDIX C

Excerpt from *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987), *appeal docketed*, No. 87-7189 (9th Cir. Apr. 27, 1987).

In re: WILLIAM P. STONECYPHER, d/b/a KEY CONE COMPANY AND KEY STONE RANCH.

P. & S. Docket No. 6795.

Decision and order filed April 7, 1987

Packer—Issuing insufficient funds checks—Failing to pay and failing to pay, when due, for livestock and meat—Civil penalty—Default.

Ben E. Bruner, for complainant.

Respondent, *pro se*.

Decision issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and the failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings Of Fact

WILLIAM STONECYPHER d/b/a KEY CONE CO. and KEY STONE RANCH

1. (a) William P. Stonecypher, hereinafter referred to as the respondent, is an individual doing business as Key Cone Company and Key Stone Ranch. The respondent's mailing address is P.O. Box 536, Lockford, California 95237.

(b) The respondent, at all times material herein, was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning and subject to the provisions of the Act.

2. (a) The respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II (a) of the Complaint and Notice of Hearing, purchased livestock and issued checks in payment which were returned unpaid by the bank upon which they were drawn, because the respondent did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) The respondent, on or about the dates and in the transactions set forth in paragraph II (a) of the Complaint and Notice of Hearing, and on or about the dates and in the transactions set forth in paragraph II (b) of the Complaint and Notice of Hearing, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of November 3, 1985, there remained unpaid a total of $57,848.05 for such livestock purchases.

3. (a) The respondent, before or on November 7, 1986, purchased meat from the sellers listed in paragraph III (a) of the Complaint and Notice of Hearing and failed to pay, when due, the full purchase price of such meat.

(b) As of November 20, 1986, there remained unpaid by the respondent $61,252.54 for such meat purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

By reason of the facts found in Finding of Fact 3 herein, the respondent has wilfully violated section 202(a) of the Act (7 U.S.C. § 192).

Order

Respondent William P. Stonecypher, doing business as Key Cone Company and Key Stone Ranch, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the

bank account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock;

3. Failing to pay the full purchase price of livestock;

4. Failing to pay, when due, the full purchase price of meat; and

5. Failing to pay the full purchase price of meat.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), the respondent is assessed a civil penalty of in the amount of Fifteen Thousand Dollars ($15,000.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final May 18, 1987.—Editor.]

In re: THOMAS W. WELCH.

P. & S. Docket No. 6243

Order filed May 1, 1987.

Order issued by William J. Weber, Administrative Law Judge.

SUPPLEMENTAL ORDER

On March 23, 1984, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of ninety days and thereafter until he demonstrates that he is no longer insolvent.

Respondent has now demonstrated solvency. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 23, 1984, is terminated. The order shall remain in full force and effect in all other respects.

RAYMOND C. ANDREWS, M.D. v. ARTHUR L. MARTELLA d/b/a A&M LIVESTOCK AUCTION.

P & S Docket 6429.

Decision and order filed May 27, 1987.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), an Order of Dismissal was issued on November 10, 1986. A petition for reconsideration was received from complainant on March 23, 1987, which was timely because of an unintended delay in service of that Order on complainant, and an extension of time granted at complainant's request for reasons given. The petition for reconsideration was prepared by complainant himself without assistance of counsel.

The petition was served on March 31, 1987 on respondent's counsel of record, from whom a response was received on April 14.

The substance of the complaint filed in 1984 to begin the proceeding was that respondent, as a market agency, failed to obtain fair market value when selling certain Holstein heifers consigned to him. The case involved several consignments to respondent's market, between January 20 and March 14, 1984, and several sales by respondent, between February 22 and March 28, of a total of 108 animals of complainant.

As recited in the Order of Dismissal, Mr. A. Sterling Cole, who pastured complainant's animals, sent some cull animals of his own to respondent's market during the same few months as he sent complainant's animals there.

The petition for reconsideration referred specifically to an announcement made by respondent on March 14, 1984, the day when 46 of complainant's animals were sold at respondent's market, that some of those animals had needed assistance in calving at the market so that buyers of the remaining springers (animals about to calve) had better take precautions to avoid loss of them in calving.

The substance of complainant's contention about that announcement is that, if any animals sold that day needed assistance in calving at the market, they must have been cull animals of Mr. Cole and not animals of complainant. Complainant attempted to establish this by evidence of confusion by respondent of complainant's animals with Mr. Cole's culls, which is detailed at length in the petition for reconsideration. That evidence was carefully considered in the preparation of the November 10, 1986 Order of Dismissal, and it does not establish the facts as contended by complainant.

It is undisputed that some animals of complainant which were sold that day at respondent's market had calved at that market. As to whether those animals in fact needed assistance in such calving, as announced by respondent at the sale, the only evidence in the record was respondent's testimony that they did. The record does not contain any evidence that in fact they did not. That testimony of respondent was not so incredible that we could find it to be false in the total absence of anything in the record to contradict it.

All contentions of the petition presented for the record have been considered whether or not specifically mentioned herein, and it is concluded that, after a careful examination of the record and a review of the findings and conclusions relating to the contentions of the petition, no changes in such findings and conclusions should be made.

The November 10, 1986 Order of Dismissal, and this order, are the same as orders issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authorized by Act of April, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1982 ed., app. pg. 1068.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702–3 and *United States v. I.C.C.*, 337 U.S. 426.

Copies hereof shall be served on the parties.

In re: FREE STATE PRODUCE, INC.

PACA Docket No. 2-7231.

Decision and order filed April 15, 1987.

Failure to make full payment promptly—Willful, flagrant and repeated violations —Publication of the facts—Default.

Andrew Y. Stanton, for complainant.

Respondent, pro se.

Decision issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 15, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December, 1984, through May, 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from fourteen sellers, 49 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $146,779.90.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Free State Produce, Inc., is a corporation, whose address is Maryland Produce Market, Unit 14, Jessup, Maryland 20794.

2. Pursuant to the licensing provisions of the Act, license number 810399 was issued to respondent on December 16, 1980. This license was renewed annually, but terminated on December 16, 1985, pursuant to Section 4(a) or the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period December, 1985 through May, 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from fourteen sellers, forty-nine lots of fruits and vegetables, all being perishable

agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $146,779.90.

Conclusions

Respondent's failure to make full payment promptly with respect to the forty-nine transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final May 22, 1987.—Editor.]

In re: JDC ENTERPRISES, INC., a/t/a ROGERS WHOLESALE PRODUCE.

PACA Docket No. 2-7342.

Decision and order filed February 27, 1987.

Failure to pay promptly—Willful, flagrant and repeated violations—Publication of the facts—Default.

Edward Silverstein, for complainant.

Respondent, pro se.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 9, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1985 through May 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make

full payment promptly of the agreed purchase prices, in the total amount of $254,477.87.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, JDC Enterprises, Inc., a/t/a Rogers Wholesale Produce, is a corporation, whose address is 3165 Jeffcote Road, Conroe, Texas 77303.

2. Respondent is not, and has never been, licensed under the PACA. Respondent, however, carried on business as a commission merchant, dealer, or broker as those terms are defined in Section 1 of the PACA (7 U.S.C. § 499a), and was, therefore subject to the licensing provisions of the PACA at the time of the transactions involved herein.

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1985 through May 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 28 sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $254,477.87.

Conclusions

Respondent's failure to make full payment promptly with respect to the 113 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final May 14, 1987.—Editor.]

agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $146,779.90.

Conclusions

Respondent's failure to make full payment promptly with respect to the forty-nine transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceedlng within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[Thls decislon and order became final May 22, 1987.—Editor.]

In re: JDC ENTERPRISES, INC., a/t/a ROGERS WHOLESALE PRODUCE.

PACA Docket No. 2-7342.

Decision and order filed February 27, 1987.

Failure to pay promptly—Willful, flagrant and repeated violations—Publication of the facts—Default.

Edward Silverstein, for complainant.

Respondent, pro se.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Prelimlnary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 9, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1985 through May 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 28 sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but falled to make

full payment promptly of the agreed purchase prices, in the total amount of $254,477.87.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, JDC Enterprises, Inc., a/t/a Rogers Wholesale Produce, is a corporation, whose address is 3165 Jeffcote Road, Conroe, Texas 77303.

2. Respondent is not, and has never been, licensed under the PACA. Respondent, however, carried on business as a commission merchant, dealer, or broker as those terms are defined in Section 1 of the PACA (7 U.S.C. § 499a), and was, therefore subject to the licensing provisions of the PACA at the time of the transactions involved herein.

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1985 through May 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 28 sellers, 113 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $254,477.87.

Conclusions

Respondent's failure to make full payment promptly with respect to the 113 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final May 14, 1987.—Editor.]

In re: PRANGE FOODS CORPORATION.

PACA Docket No. 2-7199.

Decision and order filed April 10, 1987.

Failure to pay promptly—Willful, flagrant and repeated violations—Publication of the facts—Failure to specifically deny allegations constitutes admission.

Allan R. Kahan, for complainant.

Philip A. Brown, St. Joseph, Michigan, for respondent.

Decision issued by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on June 10, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January through October, 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from nine sellers, 39 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $210,709.89.

A copy of the complaint was served upon respondent. Respondent's answer does not specifically deny the failure to pay for the produce, claiming that the bank was at fault when it seized the respondent's bank account. By section 1.137(c) of the Rules of Practice, respondent's failure to specifically deny the allegations, specifically to pay for the produce, respondent has admitted the substantive facts regarding the failure to pay for the produce. Therefore, upon the motion of the complainant for the issuance of a Decision on the pleadings, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Prange Foods Corporation, is a corporation whose address is P. O. Box 884, Benton Harbor, Michigan 49022.

2. Pursuant to the licensing provisions of the Act, license number 820881 was issued to respondent on April 9, 1982. This license was renewed annually, but terminated on April 9, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period January through October, 1984, respondent purchased, received, and accepted in interstate and foreign commerce, from nine sellers, 39 lots of fruits and vegetables, all being perishable agricultural

commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $210,709.89.

Conclusions

Respondent's failure to make full payment promptly with respect to the 39 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final May 25, 1987.—Editor.]

ACTION PRODUCE v. INGE PRODUCE and/or A.G. SHORE COMPANY INC.

PACA Docket No. 2-7442

Order issued May 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a et seq.), respondent Inge Produce failed to file a timely answer. However, respondent Inge Produce filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, the default in the filing of an answer of respondent Inge Produce is set aside and the proposed answer submitted by respondent Inge Produce is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of the answer of respondent Inge Produce is enclosed herewith to complainant and respondent A.G. Shore Company Inc.

A.J.M. FARMS, INC. v. MACK DEMPSEY, d/b/a MACK DEMPSEY CO.

PACA Docket No. 2-7044.

Order issued May 22, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER [Continuance]

(Summarized)

This proceeding was continued until the Department receives proper notification that respondent's proceeding now pending in the United States Bankruptcy Court has been closed or dismissed.

BLUE BAR BLUEBERRIES v. SAWYER FRUIT & VEGETABLE COOPERATIVE CORP.

BLUE BAR BLUEBERRIES v. SAWYER FRUIT & VEGETABLE CO-OP.

PACA Docket No. 2-7102.

Decision and order issued May 12, 1987.

Frozen blueberries—Rejection—Burden of proof.

Where complainant fails to prove rejected frozen blueberries complied with parties' contract, the complaint was dismissed.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Michael Malinowski, Grand Rapids, Michigan, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 5 499a et seq.). A timely complaint was filed in which the complainant seeks reparation from respondent in the amount of $13,797.25 in connection with one transaction, in the course of interstate commerce, involving frozen blueberries, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount in dispute was less than $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. 5 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file additional evidence by way of verified statements. Complainant filed a verified opening statement, respondent filed a verified answering statement, and complainant filed a verified statement in reply. Moreover, the presiding officer invited the parties to respond to specific requests for information concerning the matters at issue herein. Each party did so. Also, each party filed a brief.

Findings of Facts

1. Complainant, Blue Bar Blueberries, is a partnership consisting of Robert J. Madl and Deborah M. Madl whose mailing address is 15372 Cove St., Grand Haven, Michigan 49417.

2. Respondent, Sawyer Fruit and Vegetable Cooperative Corp., is a corporation whose mailing address is P.O. Box 268, Bear Lake, Michigan 49614. At all material times respondent was licensed under the Act.

3. On July 29, 1985, in contemplation of interstate commerce, by written contract, respondent purchased 2,667 30# cartons of free flow-

ing frozen cultivated blueberries, 1985 crop and pack, guaranteed USDA Grade A, at a price of 66* per pound for a total agreed contract of $52,806.60. The term of sale was f.o.b. West Michigan Dock, Muskegon, Michigan. Transfer of title was to be accomplished by non-negotiable warehouse receipt on August 23, 1985. Payment was to made by August 31, 1985, provided respondent received an invoice and the warehouse receipt. The sale was negotiated through George E. Dent Sales, Inc., ("Dent"), 3094 Niles Road, St. Joseph, Michigan 49085, acting as broker. On the day of the sale, Dent issued a Sales Confirmation (No. 2572) containing the above terms. The first blueberries for this shipment, designated lot No. 3134, consisting of 1356 cartons, was delivered to the West Michigan Dock & Market Corporation, ("West Michigan Dock"), Muskegon, Michigan, on or about July 27, 1985. The second portion of the lot, designated lot no. 3134A, consisting of 1,311 cartons was delivered to West Michigan Dock on August 9, 1985. On August 14, 1985, West Michigan Dock issued its Warehouse Receipt No. 0118 covering these frozen blueberries.

4. During the freezing process, fresh blueberries become stable (*i.e.*, they are no longer subject to mold growth) at or below a temperature of 15° F. However, blueberries are not considered to be fully or completely frozen until their temperature reaches 0° F.

5. As bluebefries freeze, they expand and any mold in them is masked by absorption into the berries or by appearing to be ice crystals on the berries' surfaces. While moldy unfrozen blueberries have a distinctive sour odor, this smell is lessened after the moldy berries have been completely frozen.

6. On or about August 19, 1985, 200 of the total 2,667 boxes of frozen blueberries labeled July 23, 25, and 26, 1985, were transferred from West Michigan Dock, which complainant had engaged to freeze and store them pending sale, to Big Valley Cold Storage, ("Big Valley"), which received them on behalf of respondent. The transfer document indicated that the shipper, who was noted to be the respondent, was aware that the blueberries were not completely frozen. Upon receipt, the employees of Big Valley noted that the berries were not completely frozen, that they were both visibly moldy, and that they gave off the distinctive sour odor indicating that they were moldy. Further, a temperature probe inserted into approximately ten of the boxes reflected temperatures of about 21° F. Lastly, the employees of Big Valley noted that the boxes of blueberries were stacked so tightly on four or five wooden skids that air could not easily flow through the stacks.

7. After phoning respondent with the information, Big Valley restacked the 200 boxes of blueberries so that the proper amount of air could circulate between the boxes of blueberries and completely freeze them.

8. Several hours later, Bob Madl, one the partners in complainant partnership, phoned Big Valley regarding the condition of the berries. Their condition as noted above was reported to him. Also, he was advised to inspect the remainder of the blueberries at West Michigan Dock. The following day, Mr. Madl called Big Valley again. He reported that he had found that the berries at West Michigan Dock were not completely frozen, and that the boxes were not properly air stacked. Mr. Madl reported to Big Valley that employees of West Michigan Dock had begun to correct the problems and thanked Big Valley for its advice.

9. On or about August 20, 1985, respondent rejected all of the blueberries to complainant. Dent, on that same day, issued an Amended Sales Confirmation (No. 2572–A) canceling the sales confirmation it issued on July 29, 1985.

10. On September 6, 1985, a Federal inspection was conducted on 2,467 30# boxes of blueberries at West Michigan Dock. [1] On the certificate Issued thereafter, Y 050714, it was noted that the boxes had labels which indicated that the blueberries had been washed and packed by complainant, and that they bore the following dates: July 23, 24, 25, 26, 27, 30, and 31, and August 2, 6, 12, 14, and 15, 1985. No temperature was recorded, but the grade was noted as follows: "U.S. GRADE A or U.S. FANCY Average Score: 95 Points Inspection and certification based on examination of finished product only. "

11. Also on September 6, 1985, a federal inspection was conducted on 200 30# boxes of blueberries at West Michigan Dock. [2] The inspector noted on the inspection certificate issued hereinafter, Y 050715, that the boxes had labels which indicated that the blueberries had been washed and packed by complainant, and that they bore dates July 23, 25 and 26, 1985. No temperature was recorded, but the grade was noted as follows: "U.S. GRADE A or U.S. FANCY Average Score: 95 Points Inspection and certification based on examination of finished product only."

12. On or about September 10, 1985, an analysis of two samples of the 200 cartons of blueberries which had been transferred to Big Valley on or about August 19, 1985, was conducted on respondent's behalf by the KAR Laboratories, Inc., 4425 Manchester Road, Kalomazoo, Michigan 49002. That analysis reflected that the "Yeast and Mold Count" was 2300 grams on one sample and 3400 grams on the other. The maximum count permitted is 100 grams each for yeast and mold.

13. On or about September 19, 1985, complaint sent respondent the following letter: "We Blue–Bar Blueberries do not except [sic] your

[1] The sample for this inspection was taken on September 4, 1985.

[2] The sample for this inspection was taken on September 5, 1985.

rejection of our blueberries. We will sell the fruit to our best advantage and will hold Sawyer Fruit and Vegetable Coopertive [sic] responsible for our losses."

14. On September 19, 1985, complainant sold 100 30# cartons of frozen, free flowing blueberries, 1985 crops and pack, U.S.D.A. Grade A, for 60¢ per pound for a total of $1,800.00.

15. On or about September 25, 1985, complainant sold 1,434 30# cartons of frozen, free flowing blueberries, 1985 crop, U.S.D.A. Grade A to Joseph Buchwald and Sons, Inc., ("Buchwald"), 1320 Marshall St., Redwood City, California 94063, for 56¢ per pound f.o.b. West Michigan Dock, or a total of $24,091.20. The sales agreement, which was reached through Victor D. Bendel Co., P.O. Box 99, Hinsdale, Illinois 60521, gave the buyer an option on 1,234 additional cartons. The 1,434 cartons of blueberries were shipped on or about September 27, 1985, and were received and accepted.

16. On or about October 4, 1985, Buchwald exercised its option on the 1,234 cartons of blueberries, and ordered 200 additional cartons at the same price. Pursuant to the agreement between Buchwald and complainant the 1,434 additional 30# cartons of frozen free flowing blueberries, 1985 crop, U.S.D.A. Grade A were shipped to the former on or about December 2, 1985. The terms of the agreement were the same as for the September shipment, *i.e.*, 56¢ per pound for the 1,454 30# cartons, f.o.b., West Michigan Dock, for a total price of $24,091.20. As to this shipment, Buchwald was required to reimburse complainant for freight charges of $2,400.00.

17. On November 11, 1985, complainant sold 797 30# cartons of frozen Michigan cultivated blueberries, 1985 crop and pack, guaranteed Grade A, for 49.5¢ per pound for a total of $11,835.45.

18. During the period October 22, 1985, through October 28,1985, complainant sold 2,724 30# cartons of frozen Michigan cultivated blueberries, 1985 crop and pack, guaranteed Grade A, for 49¢ per pound for a total of $40,042.80.

19. During the period July 27, 1985, through September 5, 1985, complainant delivered 5,695 cartons of 30# blueberries to West Michigan Pack for storage and freezing, as follows:

7/27/85	1,356 carton
8/09/85	1,311 "
8/10/85	887 "
8/18/85	780 "
8/22/85	1,159 "
9/05/85	202 "

20. The formal complaint was filed on December 6, 1985, which was within nine months after the cause of action herein accrued.

Conclusion

As respondent rejected the subject frozen blueberries, the dispositive issue in this case is whether respondent's rejection was without reasonable cause. [3] As the moving party, complainant has the burden of proving, by a preponderance of the evidence, the allegations in the complaint including the contract terms and its compliance therewith. *See Stern Produce v. Niagra Front. Serv.*, 31 Agric. Dec. 822 (1972). Thus complainant must prove that the frozen blueberries met the terms of the parties' contract. *See Bud Antle v. Bohack Corp.*, 32 Agric. Dec. 1961 (1973).

The blueberries involved in this dispute are those in lot nos. 3134 and 3134A. These blueberries were picked prior to August 9, 1985, and complainant delivered the blueberries to the West Michigan Dock on July 27 and August 9, 1985. Accordingly, the record shows that they must have been picked on one of the following dates: July 23, 24, 25, 26, 27, 30, 31, August 2, or 6,1985. These dates are significant.

Complainant relies on two federal inspections, dated September 6, 1985, to carry its burden of proving that respondent's rejection was arbitrary. The first of these No. Y 050714, covered 2,467 30# cartons. It is reported that the cartons were dated stamped on 12 different dates during the period July 23, 1985, through August 15, 1985. Three of these dates, August 12, 14, and 15, 1985, took place after the last date (August 9, 1985) on which the lots of blueberries in dispute were delivered to the West Michigan Dock. Thus, although complainant claims that all of the blueberries inspected on September 6, 1985, were part of either lot no. 3134 or lot no. 3134A, since lot no. 3134 was delivered to West Michigan Dock on July 27, 1985, and lot no. 3134A was delivered on August 9, 1985, all of the blueberries covered by Certificate No. Y 050714 could not have been part of them. Because of this, we conclude that either complainant or West Michigan Dock misidentified the inspected blueberries as consisting of lot nos. 3134 and 3134A to the federal inspector. Accordingly, since this inspection could not have been an inspection of the subject lots, it offers no relevant or probative evidence to this proceeding.

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[3] It should be noted that complainant submitted evidence of the alleged sales of its entire 1985 crop of blueberries in support of its claim that it is entitled to damages based on the price it received for the last of the 1985 crop it sold rather than merely for its alleged losses on the particular blueberries in question. While recognizing that the measure of a seller's damages for nonacceptance by a buyer is the difference between the market price at the time and place for tender and the unpaid contract price plus incidental damages resulting from the nonacceptance, *Joseph P. Katsur v. M.P. Clark, Inc.*, 28 Agric. Dec. 787 (1969), because we dismiss the complaint, we do not reach the question of damages.

The second inspection relied upon by complaint is one, also done on September 6, 1985, involving 200 cartons of the subject blueberries. As to that miniscule portion of the subject lot, consisting of only about 7.5% of the whole lot, the inspector found that the blueberries were U.S. Grade A, and scored them 95 out of a possible 100 points.

While the September 6 1985, inspection of the 200 cartons of blueberries which were part of one of the subject lots may be concluded to show that the 200 cartons complied with the contract's requirements, it is not necessarily evidence that the remaining portion of the lot complied with them. In any event, respondent has adduced contrary evidence as to whether the 200 cartons satisfied the requirements of the contract. This consists of a micro-biological analysis done by the KAR Laboratories (*see* Finding of Fact No. 13). That analysis indicates that yeast and mold count on the blueberries averaged is excess of 2400 grams which is far in excess of that permitted by the Food and Drug Administration. [4]

Other evidence in the record relating to whether the blueberries met contract requirements is also in conflict with complainant's claim that they were. For example, Ms. Emma Jean Stabek, General Manager of Big Valley, in a sworn statement, stated that the 200 cartons of blueberries which it received on August 19, 1985, were not completely frozen and that the average temperature was 21° F. She also stated that the blueberries had the "strong and distinct 'sour' smell of moldy blueberries," and that there was visible mold present. That the blueberries were not completely frozen when shipped to Big Valley from West Michigan Dock is supported by an unsworn statement from Mr. George Nittering, Vice President of the latter company, which is attached to complainant's opening statement. It is also supported by the shipment's bill of lading which contains the following statement: "PRODUCT RELEASED WITH SHIPPERS [respondent's] FULL KNOWLEDGE BERRIES ARE NOT COMPLETELY FROZEN. [West Michigan Dock] ASSUMES NO RESPONSIBILITY FOR CONDITION OF BERRIES OR BOXES DURING TRANSIT AND ARRIVAL." Blueberries which were picked during the period July 23–26, 1985, and delivered to West Michigan Dock on July 27, 1985, should

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[4] It should be noted that, even though we are aware that the inspection was requested much earlier and that the sampling was done on September 4 and 5, 1985, we are somewhat troubled by the long period of time which occurred between the date when these blueberries were rejected by the respondent (August 20, 1985) and the date of these federal inspections. That is, there is a question as to the probative value of the two federal inspections both of which took place about three weeks after the rejection (on September 6, 1985) in helping us to reach a conclusion as to whether respondent's rejection on August 20, 1985, was wrongful. The same question arises too with regard to the KAR Laboratories analysis which was conducted on a sample taken on September 10, 1985.

have been fully frozen by August 19, 1985, if they were properly handled. That they were not is evidence that complainant (or West Michigan Dock) may not have handled the blueberries properly.

Complainant offers no evidence other that the two federal inspection certificates to support its assertion that the blueberries met the contract's requirements. [5] It does argue that, since it sold all of the 1985 crop of blueberries, the blueberries in question must have been okay. [6] However, complainant has failed to adduce sufficient evidence from which we could make that conclusion.

Therefore, on the basis of the record, we must conclude that complainant has failed to sustain its burden of proving that the blueberries in question satisfied the terms of the parties' contract. Accordingly, the complaint must be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

BOSKOVICH FARMS, INC. v. INTERCOAST MARKETING, INC.

PACA Docket No. 2-7440.

Order issued May 12, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $9,514.35 in connection with a

[5] There was an unsworn statement from a buyer regarding its alleged purchase of the subject blueberries. However, in view of the confusion as to what blueberries were in the subject lots, *see* discussion above concerning the September 6, 1985, federal inspection of 2467 30# cartons, we cannot conclude that this customer purchased any or all of the 2,667 cartons in dispute. In any event, since this statement is not verified, it has no evidentiary value.

[6] There is insufficient evidence in the record to support complainant's allegation in this regard, and what evidence is in the record is confusing. For example, if complainant's allegation was accurate, the numbers of cartons it delivered to West Michigan Dock, presumably its only processor, should equal the number of cartons it sold. However, the evidence submitted by complainant reflects that it delivered only 5,695 30# cartons to West Michigan Dock, but sold 6,489 30# cartons. This inconsistency is never explained, but it could indicate that, at least, 894 cartons were sold twice. One might conclude, if there was such a double sale, that the first purchaser returned the blueberries because of their condition.

transaction involving the shipment of vegetables in interstate commerce.

A copy of the formal complaint was served on respondent. Respondent filed an answer in which it admitted liability for $8,014.35, but asserted that it had entered into a settlement with complainant. Respondent attached to its answer as exhibit one a copy of the purported settlement, signed by Joseph W. Boskovich, vice-president of complainant, and dated September 12, 1986. The alleged settlement reads as follows, in relevant part:

> Intercoast Marketing is going to pay you 3% of our outstanding balance until the debt is paid. If we collect additional money from people who are indebted to us, we will reduce the debt, at a much faster rate. We feel that you should be paid in one year, if we have any luck at all with our collections . . . .
>
> * * *
>
> If you agree with this arrangement, please sign below, and return in the enclosed envelope.

In view of this apparent settlement agreement, complainant was sent a letter, dated March 17, 1987, giving it an opportunity to show cause why its complaint should not be dismissed. Complainant filed a response on March 31, 1987, denying that a settlement agreement was intended by the parties. Complainant also argued that respondent had failed to perform its obligations under the agreement. However, contrary to complainant's contentions, it is abundantly clear from the terms of the document submitted by respondent that it was intended to be a settlement of the amount owed complainant. We fail to see how it could have been perceived otherwise by complainant's vice-president, who freely elected to sign it. Whether or not respondent has complied with the settlement is not within the Secretary's jurisdiction, as this issue does not involve a perishable agricultural commodity. *Jebavy-Sorenson Orchard Company v. Lynn Foods Corporation*, 32 Agric. Dec. 529 (1973). Therefore, we find that there was a settlement agreement entered into between the parties, necessitating dismissal of the complaint.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RICHARD S. BROWN, INC. v. POST & TABACK, INC.

PACA Docket No. 2-7080.

Order issued May 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on November 24, 1986, awarding complainant reparation in the amount of $385.50 plus interest. On December 24, 1986, complainant sought reconsideration of this Decision and Order, and on January 27, 1987, the Decision and Order was stayed pending reconsideration. By order issued March 13, 1987, complainant's petition for reconsideration was granted, and complainant was awarded reparation in the amount of $1,320.80 plus interest. On March 31, 1987, the respondent sought reconsideration of the March 13, 1987, Order on Reconsideration.

We have reviewed the November 24, 1986, Decision and Order and the March 13, 1987, Order on Reconsideration in the light of the respondent's petition. Upon review, we are of the opinion that our our March 13, 1987, Order on Reconsideration, is amply supported by the evidence and by the law applicable thereto. Accordingly, respondent's petition for reconsIderation is dismissed without prior service upon complainant.

The order of March 13, 1987, is reinstated, except that the reparation awarded therein shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

BUSHMANS' INC. v. INTERNATIONAL A.G., INC.

PACA Docket No. 2-7466.

Order issued May 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on August 19, 1986. Complainant seeks to recover $4,165.00 which amount is alleged to be the total purchase price for potatoes sold to and accepted by respondent on or about February 25, 1986. Respondent filed an answer to the formal complaint on February 26, 1987, admitting that $885.00 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a

> portion of the amount claimed in the complaint as damages, the Secretary. . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $885.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

ROBERT W. CASTO, d/b/a PRIMA CITRUS & FRUIT EXCHANGE v. POST & TABACK, INC.

PACA Docket No. 2-7029.

Decision and order issued May 12, 1987.

Payment, proper party for.

Respondent made payment for a load of produce to an intermediary thinking him to be the principal. After such payment on the first load was made respondent learned of complainant's probable interest in the remaining four loads which respondent had received through the intermediary and directed payment for such loads to complainant. Respondent did not receive, or negotiate to receive, the remaining five loads. Such were directed to a party or parties unknown. It was held that complainant failed to submit evidence sufficient to show any liability on respondent's part for the first load or the last five loads.

George S. Whitten, Presiding Officer.

Chester J. Peterson, Phoenix, Arizona, for complainant.

Irving Coopersmith, New York, New York, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $87,633.90 in connection with the consignment in interstate commerce of ten truckloads of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement and respondent did not file an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Robert W. Casto, is an individual doing business as Prima Citrus & Fruit Exchange, whose address is 5001 E. Washington, Suite 201, Phoenix, Arizona.

2. Respondent, Post & Taback, Inc., is a corporation whose address is 253-256 N.Y.C. Terminal Market, Bronx, New York. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about June 21, 1984, through July 8, 1984, complainant, through his salesman, Dan Danilson, consigned 10 truckloads of perishable produce consisting in various parts of grapes, cantaloupes, and plums, and shipped such produce on the same dates. At all times, Mr. Danilson dealt with Kevin Razzoli. Mr. Razzoli had five of the truckloads sent to respondent and the remaining five sent to unknown destinations.

4. Kevin Razzoli represented to respondent that he was dealing with the produce for his own account. Respondent resold the produce and accounted for the first load, along with a check in payment therefor, to Kevin Razzoli. Thereafter, respondent learned of complainant's probable interest in the remaining four loads and accounted to complainant for such loads along with payment therefor.

5. An informal complaint was filed October 1, 1984, which was within nine months after the causes of action alleged herein accrued.

Conclusions

Complainant brought this action against respondent to recover the alleged value of ten loads of perishable produce allegedly consigned to respondent. The complaint was signed and sworn to by complainant. Respondent's sworn answer is signed by Dana Taback and admits receipt of five of the truckloads, but states that respondent had no knowledge of complainant's involvement in any of the transactions. Respondent states that it accounted to Kevin Razzoli for the first truckload and

then, after learning of complainant's probable interest in the remainder of the loads of produce, accounted to complainant. Complainant made no reply to respondent's answer and submitted no further evidence in this proceeding. An extensive report of investigation was made and filed by the Department's administrative personnel, including a personal report of investigation which examined the records of respondent as well as of other firms purported to have received some of the produce. The investigator also made an effort to determine the whereabouts of Kevin Razzoli but without success. A letter to complainant's attorneys summarizes the results of the Department's investigation in relevant part as follows:

> We have recently performed an investigation of this matter and have determined the following. Post & Taback admits receiving the product covered on your client's invoices 164632, 164724, 164726, 164732, and 164644. A review of Post & Taback's records revealed that it has not received or sold any of the additional shipments.
>
> It was Post & Taback's contentions that it was dealing only with Mr. Kevin Razzoli d/b/a R & P Produce and did not even know your client was the shipper until the proceeds of $2,865.20 on invoice 164632 had been paid to R & P Produce, a copy of which is enclosed.
>
> Your client received accountings and inspections made on the other four loads. We can find no fault with Post & Taback's handling of these loads. Your client's invoices were apparently not sent until well after the transactions took place. The bills of lading do not identify your client as the shipper, and once respondent learned that Prima Citrus was the shipper, it suspended payments to Mr. Razzoli and accounted to Prima for the balance of the loads received. It is also our opinion that the inspection certificates presented by respondent are valid and justify its handling and sales of the fruit for your client's account.
>
> . . .
>
> With respect to the balance of five loads, your client stated its understanding that three, 164637, 164639, and 54002 went to Stanley & Joe Russo, Bronx, NY. Mr. Joe Russo has denied receiving those loads, and an investigation into that firm's records disclosed no evidence to show that the three loads were received by Stanley & Joe Russo.
>
> There is nothing in the file nor was there any evidence found during the investigation to show who received the other two loads, invoices 164636 and 164722.
>
> In summary it appears that the only person against whom your client would have any recourse would be Kevin Razzoli, d/b/a R & R Produce. In this connection, inquiries were made as to the whereabouts of Kevin Razzoli. His father, Emile Razzoli, who formerly worked for Post & Taback, was contacted. Mr.

Razzoli stated that he did not know where his son is, not having heard from him in several weeks.

A visit was also made to 535 Newark Ave., Jersey, City, N.J., the former location of R & R Produce. That location presently is occupied by an insurance agency.

Complainant chose to ignore the advice of the administrative personnel and to file a formal complaint against respondent. Complainant was certainly within his rights to do so. However, complainant has submitted no additional evidence which would indicate that respondent has any further liability to complainant in regard to any of the matters alleged in the formal complaint. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

DAVIS PACKING CO., PAT H. HODGES, JOHN KAI AND RALA SINGH, d/b/a ACTION PRODUCE v. TOM LANGE COMPANY, INC.

PACA Docket No. 2-7449.

Order issued May 22, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $23,489.70 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent, who filed an answer thereto. Said answer contained a counterclaim in the amount of $2,221.10. By letter dated April 23, 1987, complainant notified the Department that settlement had been reached and that it no longer wished to pursue its complaint. Respondent, by letter dated April 23, 1987, notified the Department that it no longer wished to pursue its counterclaim. Complainant, in its letter of April 23, 1987, authorized dismissal of its complaint filed herein. Respondent, in its letter of April 23, 1987, authorized dismissal of its counterclaim filed herein.

Accordingly, the complaint is hereby dismissed. The counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

FRANCIS PRODUCE CO., INC. v. TOMATO OF VIRGINIA, INC.

PACA Docket No. 2-6915.

Decision and order issued May 14, 1987.

Decision issued by Donald A. Campbell, Judicial Officer.

DENIAL OF PETITION FOR RECONSIDERATION

By letter dated March 26, 1987, and received by the Department on March 31, 1987, respondent Grayson E. Lewis enclosed a copy of the Articles of Incorporation of Tomato of Va., Inc., which shows the date of incorporation to be October 28, 1983. The letter and attachments are considered to be a Petition for Reconsideration.

Although this petition could be denied because it was not filed within the ten days set forth in § 47. 24 (a) of the Rules of Practice (C.F.R. § 47.24 (a)), it is not necessary. Even if the documentation presented by respondent were accepted as evidence, such facts would not charge the decision issued. The Articles of Incorporation clearly shown the respondent as one of the members of the board of directors. The other persuasive evidence clearly shows that respondent was involved with the management of Tomato of Virginia, Inc., and as such is responsibly connected with the violations. Given these facts, there is no reason to overturn the decision and order.

Respondent's Petition for Reconsideration is hereby denied.

HARLLEE-GARGIULO, INC. v. W.W. RODGERS & SONS PRODUCE, INC., and/or DEBRA TOSCANO d/b/a BONITA BROKERAGE CO.

PACA Docket No. 2-7155.

Decision and order issued May 27, 1987.

Burden of proof, buyer.

Where buyer receives and accepts produce, it has the burden of proving shipper breached the contract and any resulting damages.

Edward M. Silversteln, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

HARLLEE-GARGIULO v. W.W. RODGERS & SONS, DEBRA TOSCANO

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondents in the amount of $3,680.00, in connection with one transaction in interstate commerce involving tomatoes, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. Respondents also were served with copies of the formal complaint. Respondent W.W. Rodgers & Sons Produce, Inc., filed a timely answer in which it denied any further liability to complainant with regard to the subject shipment. Although respondent Debra Toscano d/b/a Bonita Brokerage Co. failed to file a timely answer, after her default was set aside, she did file an answer denying any liability to complainant.

As the amount in dispute was less than $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Under this procedure, the Department's report of investigation and the verified pleadings of the parties [1] are considered as part of the evidence in the case. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, and respondent W.W. Rodgers & Sons Produce, Inc., filed an answering statement. W.W. Rodgers & Sons Produce, Inc., also filed a brief.

Findings of Fact

1. Complainant, Harllee-Gargiulo, Inc., is a corporation whose mailing address is P.O. Box 8, Palmetto, Florida 33561.

2. Respondent, W.W. Rodgers & Sons, Inc. ("Rodgers") is a corporation whose address is 1015 S. Harwood Street, Dallas, Texas 75201.

3. Respondent, Debra Toscano ("Toscano") is an individual doing business as Bonita Brokerage Co., whose address is 624 Overlook Drive, Stuart, Florida 33494.

4. At all material times, each respondent was licensed under the Act or was operating subject to license.

5. On or about June 4, 1985, in the course of interstate commerce, Rodgers purchased a trucklot of tomatoes from complainant consisting of 1,600 25# cartons of size 5x6 Harllee tomatoes at an agreed f.o.b. price of $5.00 per carton plus ripening room services (50¢ per carton) and palletization (15¢ per carton) for a total f.o.b. price of $5.65 per carton or $9,040.00. The tomatoes were to be shipped on June 8, 1985, however, because the truck did not arrive at complainant's ship-

[1] The answer filed by respondent Debra Toscano d/b/a Bonita Brokerage Co. was not verified and was not considered as evidence.

ping dock on that day, the tomatoes were not actually shipped until June 10, 1985. Upon arrival, Rodgers received and accepted the tomatoes.

6. Rodgers has paid complainant $5,360.00 with respect to the subject shipment.

7. The formal complaint was filed on December 30, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

There is no dispute regarding the fact that Rodgers received and accepted the tomatoes in question. Having accepted them, Rodgers is obligated to complainant for the full purchase price thereof less any damages resulting from a breach of contract committed by complainant. *Rocky Ford Dist. Co. v. Angel Produce,* 29 Agric. Dec. 93 (1970), Rodgers has the burden of proof on such matters. *The Growers-Shipper Pot. Co. v. Southw. Prod. Co.*, 28 Agric. Dec. 571. (1969).

Rodgers claims that the tomatoes arrived in poor condition and that it negotiated a lowered contract price with complainant through Toscano. However, it has not carried its burden of proving that the tomatoes arrived in poor condition, [2] and also has failed to prove that complainant agreed to renegotiate the contract. While a document which might be interpreted to support Rodgers' claim that the contract price was renegotiated is in the report of investigation, the document has Toscano's letterhead and does not mention complainant. In fact, the document appears more like an invoice from Toscano to Rodgers than the confirmation of sale which Rodgers apparently is claiming it to be. Moreover, complainant denies renegotiating the contract and denies receiving the document referred to above.

In view of the above, we find that Rodgers has failed to sustain its burden of proof that the tomatoes were damaged and that their price was renegotiated between it and complainant. Therefore, we further find that it is obligated to complainant for the full contract price of the trucklot of tomatoes, or $9,040.00. As it only has paid complainant $5,360.00, it is obligated to complainant for the remaining $3,680.00. Its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest ought to be awarded.

Complainant has submitted no evidence by which we could conclude that Toscano is obligated to it in any way regarding the subject shipment. Consequently, we must dismiss the complaint against her.

Nothing contained herein should be interpreted as resolving any legal or factual issues regarding whether Toscano is liable to Rodgers for damages as a consequence of her company's actions as to this transaction. It may be that Rodgers does have a cause of action against her.

[2] Such proof could have consisted of a federal inspection.

However, such a cause of action is not before us at this time and we do not rule upon it. [3]

Order

Within 30 days from the date of this order, respondent W.W. Rodgers & Sons Produce, Inc., shall pay complainant $3,680, as reparation, plus interest at the rate of 13% per annum from July 1, 1985, until paid.

The complaint against respondent Debra Toscano d/b/a Bonita Brokerage Co. is dismissed.

Copies of this order shall be served upon the parties.

HERMAN J. HEIDRICH & SONS v. M. PAGANO & SONS, INC.
PACA Docket No. 2-7078.
Decision and order issued May 12, 1987.

F.O.B. sale—Inspection, untimely—Accounting, failure to render.

Complainant sought reparation for adjusted purchase price of peaches sold and shipped to respondent at alleged f.o.b. price with protection for market decline through date of arrival. Respondent contended that the peaches were purchased on a delivered basis, and that Federal inspection 3 days following arrival showed a breach of contract. It was held that respondent's objection to complainant's invoice for f.o.b. adjusted price was not timely, and that sale was f.o.b. Inspection was also said to be too remote in time from time of arrival to show breach of contract under either f.o.b. or delivered sale terms. It was also stated that since respondent failed to render an accounting of its resale, damages could not have been awarded in any event. Award to complainant for f.o.b. purchase price less adjustment for market decline.

George S. Whitten, Presiding Officer.

Complainant, pro se.

Frank Lattanzio, Franklin Square, New York, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $14,050.00 in connec-

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[3] As a practical matter, if Rodgers did not file a complaint against Toscano within nine months after such a cause of action accrued, we have no jurisdiction to hear the cause of action. *See* 7 U.S.C. § 499f(a). However, the cause of action might be heard by another forum.

tion with the shipment in interstate commerce of a truckload of peaches.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47. 20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, however, respondent did not file an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Anne H. Deibel, Mary L. Harper, Francis X. Heidrich, Jr., Francis X. Heidrich, Sr., Patricia A. Ramsby, Trust for Herman J. and Trust for Mary F., doing business as Herman J. Heidrich & Sons, whose address is P. 0. Box 17695, Orlando, Florida.

2. Respondent, M. Pagano & Sons, Inc., is a corporation whose address is 59 Brooklyn Terminal Market, Brooklyn, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On June 20, 1985, complainant sold to respondent one truckload containing 1000 3/4 bushel containers of 2½ inch and larger U.S. Extra Number 1 Red Haven peaches at $15.00 per carton, and 100 3/4 bushel cartons of 2¼ inch and larger U.S. Extra No. 1 Red Haven peaches at $13.00 per carton, f.o.b. with protection for market decline through date of arrival in Brooklyn, New York.

4. On June 21, 1985, between the hours of 11:00 a.m. and 4:00 p.m., the peaches were federally inspected while being loaded onto a Seaboard system railroad piggyback truck. Such inspection showed that pulp temperatures ranged from 45 degrees to 52 degrees fahrenheit and revealed the peaches to be generally hard, defects well within tolerance, with no decay, and to grade U.S. Extra No. 1 for each respective size. The truck departed Johnston, South Carolina, on June 21, 1985.

5. Pursuant to the agreement between the parties for market protection, complainant lowered the price of the peaches by $1.00 per carton on the date of shipment, June 21, 1985.

6. The peaches arrived on Sunday, June 23, 1985, and were accepted by respondent. On June 24, 1985, complainant lowered the

price of the 2½ inch peaches by $1.00 per carton and the price of the 2¼ inch peaches by $1.50 per carton.

7. On June 25, 1985, at 2:00 p.m., respondent informed complainant by telephone that the peaches did not make grade, showed scars, overripe, and weak condition. Respondent advised complainant that an inspection was to follow. On June 26, 1985, at 8:45 a.m., a portion of the peaches were federally inspected and an "ABRIDGED REPORT OF FRESH FRUIT AND VEGETABLE INSPECTION" was issued which showed in relevant part as follows:

> PARTLY UNLOADED; doors closed.
>
> TEMPERATURES: Range 41° to 44°F.
>
> . . .
>
> 2½" lot; Generally 2½ to 3¼ inches in diameter, average 2% undersize. Quality and Condition: Grade defects average 7%. Mostly firm, many firm ripe, few hard. 4 to 10% in most cartons none in some average 7% soft. Ground color mostly turning yellow, many yellow few green. Average 3% damage by bruising affecting tips. Average 1% decay.
>
> 2¼" lot; 2¼ to 3 inches in diameter. Quality and Condition: Grade defects average 7%. Mostly firm, many firm ripe. 8 to 12% average 10% Soft. Ground color mostly yellow some turning yellow. Average 2% damage by bruising affecting tips. Average less than one-half of one percent decay.
>
> GRADE: 2½ and 2¼ lots Meets quality requirements but fails to grade U.S. Extra No. 1. 2½ or 2¼ inches in diameter respectively only account condition. Each lot: Grade defects are scars, misshapen and scars.
>
> REMARKS: Restricted to 100 cartons being unloaded 3 incomplete stacks and upper 3 layers in that portion of load remaining at time of inspection.

8. On June 26, 1985, respondent communicated the results of the inspection to complainant and informed complainant that "because of condition we can handle these peaches as an open billing". Respondent resold the peaches but did not render any accounting to complainant.

9. The formal complaint was filed on November 14, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

Respondent alleges that the peaches were sold on a delivered basis rather than f.o.b. as alleged by complainant. Complainant attached to the formal complaint a copy of its invoice dated June 24, 1985, when the final price had been arrived at, and such invoice states a f.o.b. sale. The earliest response to this invoice shown by the record herein is a mailgram from respondent to complainant dated July 2, 1985, stating

that the peaches were bought at a delivered price rather than a f.o.b. price. Nowhere does respondent state when the invoice from complainant was received. We conclude on the basis of all of the evidence that respondent's mailgram of July 2, 1985, did not constitute a prompt objection to the f.o.b. price quoted on complainant's invoice. However, even if we were to find that respondent had succeeded in proving that the peaches were sold on a delivered basis, we would still have to find that respondent had failed to show that the subject peaches did not deliver as U.S. Extra No. 1. This is true because the inspection was made three days following arrival of the peaches and respondent has furnished us with no explanation as to why there was delay in getting the inspection. Considering the amount of quality and condition defects shown by the federal inspection three days after arrival, we would be unable to say that there was a breach of contract on the part of complainant under either an f.o.b. or delivered terms.

In addition, even assuming respondent had shown a breach of contract, respondent would have failed to establlsh damages in this proceeding due to its failure to furnish an accounting covering the resale of the peaches. Respondent simply stated that the proceeds of the resale were $5,854.16, but nowhere did respondent offer in evidence a detalled accounting showing a breakdown of the amounts for which each carton was sold and the dates of the resale. See *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979).

Since respondent accepted the peaches, and has not shown a breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price or $14,050.00. Respondent's failure to pay complainant such amount is a violatlon of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $14,050.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this Order shall be served on the parties.

HOMESTEAD TOMATO PACKING CO., INC. v. M. & M. PONTO, INC.

PACA Docket No. 2-6964.

Ruling issued May 1, 1987.

Ruling issued by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a decision

and order was issued on March 9, 1987, awarding reparation to complainant in the amount of $1,872.00, plus interest, and dismissing respondent's counterclaim. On March 27, 1987, respondent filed a petition for reconsideration under 7 C.F.R. § 47.24(a). It is our conclusion that the issues raised by respondent were sufficiently considered in the decision and order and that the petition for reconsideration should be dismissed.

Respondent argues that the tomatoes it purchased from complainant were U.S. combination grade, and should therefore have been assigned a price applicable to that grade, not U.S. number one grade tomatoes. As the decision and order makes clear, the price assigned to the tomatoes was based on the Market News Service Reports price for tomatoes with a grade of 85% or better U.S. number one. Respondent admits that its contract with respondent called for tomatoes of that grade. Therefore, there is no merit to respondent's allegation that the decision and order erroneously used the price for U.S. number one grade tomatoes.

Respondent also contends that the decision and order should have used the market price for Tuesday, January 22, 1985, instead of the average market price for the week. However, respondent, in its answer, admitted that the contract price was to be the "established market price of week of January 20–26, 1985." Therefore, the only issue to be resolved was a determination of the established market price for the week. Respondent presented no evidence to support its claim that the price on January 22, 1985, was the applicable price. Further, the Market News Service Reports did not even contain a price quotation for January 22, 1985. Clearly, the method used by the decision and order to determine the established price, averaging the prices for the week as set forth in the Market News Service Reports, was the most accurate way to accomplish this.

Accordingly, there is no merit to the petition for reconsideration, and it is hereby dismissed. The $1,872.00 plus interest awarded in the March 9, 1987, decision and order shall be paid within 30 days from the date of this order.

HOMESTEAD TOMATO PACKING CO., INC. v. JACK ESFORMES CORP.

PACA Docket No. 2–7051.

Order issued May 12, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation against respondent in the amount of $64,209.20 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of March 23, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MAR PRODUCTS, INC. v. LLOYD ALLEN SALES & EXPORT, LTD.

PACA Docket No. 2-7133.

Order issued May 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $11,290.00 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent, who filed an answer thereto, denying liability. On the application of respondent's counsel, a deposition order was issued by the Department on June 23, 1986, ordering the July 18, 1986, deposition of complainant's president, Manolo Rodriguez. On June 19, 1986, a subpoena duces tecum was issued, compelling the appearance of Mr. Rodriguez at the July 18, 1986, deposition, and ordering him to to bring certain documents. Respondent's counsel claimed that the deposition of Mr. Rodriguez was never taken, because of complainant's lack of cooperation, and moved for a dismissal of the complaint. In a January 29, 1987, letter, complainant was given 10 days from its receipt thereof to show cause why its complaint should not be dismissed due to its failure to comply with the Department's orders. Complainant was properly served with such letter but failed to respond thereto.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GEORGE P. McDONALD d/b/a LAZY NAG PRODUCE v. EAGLES THREE, INC. d/b/a TRADEMARK PRODUCE & SALES.

GEORGE McDONALD d/b/a LAZY NAG PROD. v. EAGLES THREE, INC.

PACA Docket No. 2-6803.

Decision and order issued May 27, 1987.

Onions—F.O.B. as to price, delivered as to grade and condition—Rejection—Failure to make grade on arrival—Adjusted price offer accepted—Respondent's authorization confirmed.

Complainant sold onions through respondent, a broker, that were rejected upon arrival for failure to comply with contract term "delivered as to grade and condition." An adjusted price offer was accepted by complainant and this acceptance was confirmed in writing by respondent. Complainant failed to prove settlement was unauthorized by timely objection. Reparation awarded in amount of sales proceeds less broker fee. Prior tender of this amount precludes award of prejudgment interest in the order.

Eric Paul, Presiding Officer.

Walt Murrah, Castroville, Texas, for complainant.

Randy L. Hoenshell, Eagles Three, Inc., Kennewick, Washington, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $5,822.50 from respondent, a broker, in connection with the sale of a truckload of onions in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. The parties were given the opportunity to file briefs. Respondent filed a letter as a brief.

Findings of Fact

1. Complainant, George Pat McDonald, is an individual doing business as Lazy Nag Produce. Complainant's post office address is as follows: P.O. Box 880, Castroville, Texas 78009.

2. Respondent is a corporation whose post office address is as follows: 6201 West Clerawater, Suite F, Kennewick, Washington 99336.

3. Complainant and respondent are, and at all times material hereto were, licensed as a dealer and as a broker, respectively, under the Perishable Agricultural Commodities Act of 1930.

4. Complainant, on July 11, 1984, sold and shipped 850 sacks of prepack yellow onions, grade U.S. #1, to Green Valley Onion Co., Inc., Pine Island, New York, at an agreed on price of $7.00 per sack.

Respondent acted as a broker in this transaction and issued a confirmation of sale on July 11, 1984, that stated the terms of sale "f.o.b. as to price – delivered as to grade and condition."

5. Federal inspections performed immediately prior to shipment on July 11, 1984, and immediately after arrival on July 16, 1984, revealed that the onions were within grade when shipped, but failed to grade U.S. No. 1 upon arrival because of 8% to 25%, average 14%, Black Mold Rot or Bacterial Soft Rot. There is undisputed evidence that the transportation service provided was not normal, and undue transportation delay may have caused the onions to fail to make grade on arrival.

6. Respondent orally notified complainant on July 16, 1984, that the buyer, Green Valley Onion Co., Inc., refused to accept the shipment, and conveyed an adjusted price offer of $1.75 per sack, f.o.b., for the nonconforming onions. This settlement offer was accepted orally and confirmed in writing on respondent's complaint form on the same date.[1]

7. The inspection upon arrival was performed while the onions remained on the truck, and it may be assumed that unloading, and acceptance of the shipment, occurred subsequent to when the Green Valley Onion Co., Inc., was advised that its $1.75 per sack offer had been accepted. No claim has been asserted against Green Valley Onion Co., Inc., by either party to this reparation proceeding.

8. On July 23, 1984, complainant wrote respondent denying that it had accepted the $1.75 per sack adjusted price on July 16, 1984, and demanding payment of $7.00 per sack.

9. On or about October 9, 1984, respondent was paid $1,700.00 for the onions by Green Valley Onion Co., Inc., and on November 6, 1984, respondent issued its check in the amount of $1,572.50 (proceeds less respondent's $127.50 brokerage fee) payable to complainant. This check bore the statement "In payment for Inv. #101 in Full" and was never endorsed and deposited by complainant. A replacement check dated April 10, 1985, submitted with respondent's answer, was returned to respondent since it did not release it as an undisputed amount.

10. A formal complaint was filed in the amount of $5,950.00 (including respondent's brokerage fee of $127.50) on February 19, 1985,

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[1] Separate confirmations of sale dated July 16, 1984, were submitted with the verified pleadings showing adjusted prices of $1.75 per sack and $2.00 per sack, respectively, without explanation. It appears that the $1.75 per sack confirmation was the one transmitted to complainant.

which was within nine months from the time the alleged cause of action herein accrued.

Conclusions

Complainant clearly believes that the price adjustment from $7.00 per sack to $1.75 per sack was unreasonable in light of unsatisfactory transportation service provided by the trucking company. This opinion led directly to its letter of July 23, 1984, denying that it had authorized the price adjustment, and demanding full payment from respondent. It is probable that complainant was not aware of the legal significance of the terms of sale noted on respondent's July 11, 1984, confirmation of sale, i.e. - "f.o.b. as to price - delivered as to grade and condition" since the invoice complainant issued on July 12, 1984 stated the terms of sale as "f.o.b. - Net due 10 days." The record does not show that complainant either objected to the terms "f.o.b. as to price - delivered as to grade and condition or acknowledged that it had assumed responsibility for the onions making grade upon arrival regardless of whether the transportation service provided was normal.

Complainant's failure to timely object to the terms of sale appearing on the July 11, 1984 confirmation of sale establishes that these were the actual terms of sale. This being true, respondent's action on July 16, 1984, namely, urging complainant to accept the adjusted price offer of $1.75 a sack as the best available offer for a perishable agricultural commodity that had been properly rejected by the buyer on delivery, was reasonable. Although complainant has asserted that it immediately rejected this offer orally, and that its letter of July 23, 1984 constitutes a timely written rejection, complainant has failed to meet its burden of proof. Respondent may be found liable to complainant for the original contract price only if respondent is shown to have breached its duty as a broker by making an unauthorized price adjustment. *Sugar Creek Valley Potato Coop. v. C. W. Marvin Co., and Market Pre-Pak, Inc.*, 32 Agric Dec 1369 (1973). By letter dated August 29, 1984 (Exhibit 3 to the report of investigation) respondent's representative, Mr. Randy Hoenshell, has stated that complainant's employee, Suzanne Foust, orally agreed to accept the $1.75 per sack price adjustment. The circumstances are such as to support the truth of this statement. The rejected onions were inspected on the common carrier's truck at 8 a.m. on July 16, 1984. If the adjustment had not been orally accepted on behalf of complainant by Ms. Foust, instructions would have had to been issued as to the disposal of the shipment. Moreover, the record in this proceeding fails to show that the written confirmation prepared by Mr. Hoenshell for respondent on July 16, 1984, was objected to before complainant's letter of July 23, 1984. Complainant has failed to prove by a preponderance of the evidence that it objected on a timely basis to the price adjustment as unauthorized.

It necessarily follows that reparation should be awarded to complainant only in the amount of the actual sales proceeds received less broker fee, $1,572.50. Complainant is only entitled to an award of interest from the date of this Order since respondent tendered payment of the full amount to which complainant was entitled. Respondent's failure to pay this amount would constitute a violation of section 2 of the Act.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,572.50, plus interest at the rate of 13% per annum from the first day following the date of this Order until paid.

Copies of this order shall be served upon the parties.

NORDEN FRUIT CO., a/t/a CAL FRUIT v. SIGMA FRUIT CO., INC.

PACA Docket No. 2-7012.

Order issued May 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 5 499a *et seq.*), a Decision and Order was issued on December 8, 1986, dismissing the complaint. On January 20, 1987, the complainant filed a Petition for Reconsideration, and on January 27, 1987, the Decision and Order was stayed. Complainant's Petition was served upon respondent which filed an opposition thereto.

Complainant bases its Petition on its claim that, because its and respondent's assertions as to the terms of the parties' renegotiated contract differed, we should have concluded that there was no new contract. However, indoing so, complainant ignores our holding, in the December 8, 1986, Decision and Order, that it had the burden of proving its allegation as to the terms of the parties' new contract, that it failed to do so, but that the "preponderance of the evidence supports respondent's assertion that the parties renegotiated their contract and agreed to reduce the original $12.00 price to $10.25" per carton, rather than to $1.75 per carton as alleged by complainant. Based on this holding, we further held that, as the complainant had been obligated to pay the respondent the full amount which it indeed did pay the respondent, the complaint should be dismissed. There is nothing in the

record which warrants our concluding otherwise. [1]

We have reviewed this matter in the light of the complainant's Petition for Reconsideration and we are satisfied that our December 8, 1986, Decision and Order is amply supported by the evidence and the law applicable thereto. Accordingly, the complainant's Petition for Reconsideration is dismissed.

The Stay Order of January 20, 1987, is vacated.

The Decision and Order of December 3, 1987, is reinstated.

Copies of this order shall be served upon the parties.

NORTH COUNTY FRUIT SALES, INC. v. CAAMANO BROS., INC.

PACA Docket 2-6987.

Order issued May 4, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

EXTENSION OF TIME

On April 14, 1987, an Order was issued dismissing the complaint in this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.* That order was served on complainant on April 20.

On April 28, 1987, a mailgram was received from complainant requesting reconsideration of that dismissal order, and requesting an extension of time to June 1, 1987 for the filing of a statement of "specifically the matters claimed to have been erroneously decided and the alleged errors," as required by 547.24(a) of the Rules of Practice.

Filing of the petition to reconsider automatically operates to set aside the dismissal order pending final action on the petition, under 547.24(a). The requested extension of time to June 1, 1987 is hereby granted.

Copies of this order shall be served on the parties.

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[1] On reconsideration, the complainant cites *Red Coach Foods Corp. v. Norden Fruit Co., a/t/a Cal Fruit,* 43 Agric. Dec. (PACA Docket No. 2-6351, June 5, 1984, as supporting its theory. However, that case is not in point. The dispositive issue in *Red Coach* was whether the respondent had breached its warranty of suitable shipping condition; the dispositive issue in the instant case was whether the parties' renegotiated contract called for a new price of $10.25 per carton or $1.75 per carton. The evidence clearly supported the respondent's assertion that the parties' agreed to a $10.25 per carton price.

ORLANDO TOMATO, INC. v. TERRIFIC TOMATOES, INC.

PACA Docket No. 2-7308.

Order issued May 12, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $7,625.70 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 20, 1987, complainant notified the Department that a settlement had been reached. Complainant, in its letter of April 20, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PACIFIC FARM COMPANY v. BEACON PRODUCE CO.

PACA Docket No. 2-6818.

Decision and order issued May 27, 1987.

Transportation services, rail—Warranty of suitable shipping condition breached—Excessive condition defects—Protection established by broker—Respondent's damages exceed disputed amount—Dismissal.

Complainant sold cantaloupes f.o.b. railcar. Excessive condition defects breached the warranty of suitable shipping condition at destination. Fourteen days by rail from California to Florida was normal transportation. Disputed grant of protection, if necessary, was proven by broker testimony and written confirmation not timely objected to. Respondent's damages, $1.00 per carton handling expense, dump fee, and percentage of shipment lost in reworking and dumping times contract amount and freight charges, exceeded disputed amount. Complaint was dismissed.

Eric Paul, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Michael Paul Shienvold, Ft. Lauderdale, Florida, for respondent.

Decision Issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $7,133.70 in connection with a transaction involving a railcar shipment of cantaloupes in interstate commerce.

A copy of the report of investigation was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer thereto, admitting receipt of the cantaloupes and asserting full payment of the contract amount after appropriate deduction for handling and spoilage of cantaloupes on which respondent had been granted full protection by complainant.

Since the amount involved in this proceeding does not exceed $15,000 the issues are submitted under the shortened procedure in the Rules of Practice (7 C.F.R. 47.20). Pursuant to this procedure, the complaint and answer of the parties, being verified, are considered evidence in this case, as are the affidavit submitted by the broker, the opening and answering statements sworn to by the parties, and the Department's report of investigation. Complainant filed a brief.

Findings of Fact

1. Complaint is a corporation, Pacific Farm Company, whose post office address is 1047 M Street, Firebaugh, California 93622.

2. Respondent is a corporation, Beacon Produce Co., whose post office was, 1401 S.W. 2nd Street, Pompano Beach, Florida 33069.

3. Respondent is now, and at the time of the transaction involved herein was, licensed as a dealer under the Perishable Agricultural Commodities Act of 1930.

4. On July 18, 1984, the parties entered into an oral contract for the purchase on a f.o.b. basis and at specified sizes and prices, of some 1722 half crate cartons of cantaloupes for a total price of $7,980.90. The agreement called for shipment on July 30, 1984, by refrigerated railcar from Firebaugh, California, to Pompano Beach, Florida. These terms were noted in a memorandum of sale issued on July 18, 1984, by Farmers Potatoe Distributing Co., Inc., the broker that negotiated the sale.

5. Complainant duly loaded the railcar with the required number of cartons of cantaloupes in the specified sizes, and had a federal inspection performed at 3:30 p.m. on July 30, 1984. The inspection revealed that each lot graded U.S. No. 1 and had condition defects within tolerance. The original freight weighbill shows that the railcar left the Cromir, California shipping point in July 31, 1984.

6. The shipment was again federally inspected on the railcar following arrival at Pompano Beach, Florida. This inspection which was performed at 8:15 a.m. on August 14, 1984, revealed no decay and quality grade defects averaging 3%. It did show, however, condition defects as follows:

> Condition: Mostly ripe and firm, many firm, mostly yellow, many turning yellow. Damage by bruising ranges from 1 to 4 melons (4 to 17%) in most samples, some none, average 9%.

Soft ranges from 1 to 3 melons (4 to 17%) in most samples, many none, average 7%.

7. The 16% average condition defects found at the inspection on August 14, 1984, exceeded the 15% limit for condition defects applicable to cantaloupes at destination, by 1%.

8. The transportation service specified in the purchase agreement refrigerated railcar to Pompano Beach, Florida, was normal. A shipping time of 14 days is not excessive for a rail shipment that requires routing between California and Florida over a number of different railroads.

9. Respondent sought and was granted "protection, if necessary" by complainant in a 3-way telephone conversation between complainant's salesman, Jim Abbate, respondent's president, Larry Blumenthal, and Emmett Grandy, an employee of the broker, Farmers Potatoe Distributing Co., Inc.

10. On August 29, 1984, 731 cartons of the 1722 carton shipment (41.46% of the total), were federally inspected and found "mostly all decayed" before being dumped.

11. Respondent had repeatedly reworked the entire 1722 cartons between August 14, 1984, and August 29, 1984, and sold all the cantaloupes that it could get customers to accept.

12. The $7,133.70 that respondent deleted from the agreed purchase amount of $7,980.70 is closely equivalent to some 41.46% of the total purchase amounts for the various lots, plus 41.46% of the freight charges, and the dump fee.

13. A formal complaint was filed on March 7, 1985, which was within 9 months of the time the cause of action arose.

Conclusions

Respondent has proven by a preponderance of the rellable evidence that the complainant's warranty of suitable shipping condition was breached by reason of excessive condition defects upon arrival at the agreed upon destination. Although complainant has argued that the 14 day time was excessive judicial notice is taken that such a transit time is within normal limits applicable to railcar shipment between points in California and in Florida. Routing over three different railroads, such as is noted in the broker's standard memorandum of sale applicable to this shipment, is time consuming. Moreover, respondent's answering statement asserts that the average shipping tlmes for rail shipments from California to respondent's warehouse are "between 12 and 15 days." Complainant has failed to sustain its burden of showing abnormal transportation service.

Complainant having breached its warranty of suitable shipping condition, respondent's request for protection on August 14, 1984, appears to be entirely reasonable. The statement of respondent's president, Mr. Larry Blumenthal that complainant's salesman, Mr. Jim Abbate

orally agreed to "protection if necessary" is fully supported by the affidavit of Emmett Grandy, the broker's employee, who was also a participant to this telephone conversation. The written confirmation issued by the broker on August 14, 1984, also states that respondent was granted "protection if necessary". The denial of Mr. Abbate is not found to be credible.

Complainant is not entitled to the contract price for the cantaloupes. Respondent has asserted that it has made full payment for all saleable cantaloupes.

Respondent has claimed a labor expense for handling of $1.00 per carton which appears reasonable in light of the repeated sorting required to sell 991 cartons of cantaloupes between August 14, 1984 and August 29, 1984. The 731 cartons received, were dumped. Adding the $1,722 handling charge to 41.46% of the total agreed contract amount of $7,980.90 ($3,308.88) produces the figure $5,030.88. The freight charges were $5,027.00, and 41.46% of this figure is $2,084.19. Finally, the dump fee was $21.00. All together these figures total $7,136.07, a sum that is $844.83 less than the total contract amount. Respondent has paid $847.20 to complainant as the undisputed amount due in this transaction. Complainant is not entitled to additional payment under the circumstances established in this proceeding. Accordingly, the complainant should be dismissed.

Order

The complainant is hereby dismissed.

Copies of this order shall be served upon the parties.

RANCHO DOS PALMAS v. DON PELUCCA and/or FRESH BEGINNINGS and/or INTERNATIONAL A.G., INC.

PACA Docket No. 2-7441.

Order issued May 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). respondent International A.G., Inc., failed to file a timely answer. However, prior to the issuance of a Default Order, it filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasunable time, and that good

reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, International A.G., Inc.'s default in the filing of an answer is set aside.

International A.G., Inc., has filed a proposed answer which includes numerous exhibits, all of which are original documents. The answer and exhibits shall be returned to International A.G., Inc., in order that it may make three copies of such documents. The original and three copies of the answer and exhibits must be filed within the Department within ten days from the date on which International A.G., Inc., receives this order. If these documents are not filed in a timely fashion, this order reopening after default will be vacated.

Copies of this order shall be served upon the parties. The proposed answer and exhibits of International A.G., Inc., shall be returned to that party, along with this order.

READY PAC PRODUCE, INC. v. GODFREY'S OF SOUTHWIND, INC.

PACA Docket No. 2-7485.

Order issued May 22, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on September 8, 1986, and a formal complaint was filed on September 19, 1986. Complainant seeks to recover $23,302.20 which amount is alleged to be the total purchase price for mixed produce sold to and accepted by respondent on or between July 2 and July 29, 1986. Respondent filed an answer to the formal complaint on March 20, 1987, admitting that $4,774.91 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g (a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount,

$4,774.91. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from September 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

SUN WORLD INTERNATIONAL, INC. v. J. NICHOLS PRODUCE CO., INC.

PACA 2-7160.

Decision and order issued May 27, 1987.

Complainant's burden of proof.

Where complainant fails to prove that respondent ordered lettuce or received it, the complaint is dismissed.

Edward M. Silverstein, Presiding Officer.

Complainant, pro se.

Anton M. Weiss, Washington, D.C., for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks $897.50 as reparation from respondent in connection with one transaction, in interstate commerce, involving lettuce, a perishable agricultural commodity.

Both parties were served with copies of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

As the amount in dispute was less than $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 U.S.C. § 47.20) was followed. Under this procedure, the verified pleadings of the parties as well as the Department's report of investigation are considered as part of the evidence in the case. Also, the parties were given the opportunity to submit further evidence by way of verified state-

ments. Respondent filed an answering statement, and complainant filed a statement in reply. Moreover, respondent filed a brief.

Findings of Fact

1. Complainant, Sun World International, Inc., is a corporation whose mailing address is P.O. Box 9110, Bakersfield, CA 93389.

2. Respondent, J. Nichols Produce Co. , Inc., is a corporation whose address is 1328 5th Street N.E., Washington, D.C. 20002. At all material times, respondent was licensed under the Act.

3. On or about November 21, 1984, complainant allegedly shipped a truckload of lettuce from California to three companies, to wit: Franchise # 2718 (Youngblood, Pennsylvania); Franchise # 2716 (Manassas, Virginia) and to respondent. The total number of cartons placed on board the truck was 750. Of this amount, the trucker was instructed to leave 300 in Youngblood, 325 in Manassas, and 125 with respondent.

4. Respondent neither ordered nor received the 125 cartons of lettuce from complainant.

5. The informal complaint was filed on August 7, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

In reparation proceedings, a complainant has the burden of proving all of the allegations of its complaint including the existence of a contract with the respondent, the terms of the contract, respondent's breach of the contract, and the resulting damages, by a preponderance of the evidence. *New York v. Sandler,* 32 Agric. Dec. 702 (1973). Complainant, in the instant case, has failed to do so. As a consequence of its pleadings, complainant was obligated to prove that respondent entered into a contract with it for the purchase of 125 cartons of lettuce for a total agreed f.o.b. price of $897.50. However, the only probative evidence it submitted in support of its allegation consisted of documents which it had prepared, such as the invoice, order form, and bill of lading related to the alleged shipment. Such documents are self-serving and are not conclusive evidence of the existence of a contract, *see Goldsamt v. Schepps,* 20 Agric. Dec. 383 (1961), especially where it does not appear that respondent received any of these documents until after the institution of these proceedings. *Cf. Casey v. Albanese,* 31 Agric. Dec. (1972), where the respondent did receive copies of such documents and did not object to any of the terms contained therein, and the documents were held to be evidence of the parties' agreement. Moreover, in addition to denying that it received the invoice for the shipment, respondent also denied that it had ordered the lettuce, and denied receiving it. Complainant has failed to adduce any evidence, such as a statement from the person with whom the respondent allegedly dealt concerning the subject shipment, or a

receipt signed by an agent of respondent or a statement from the trucker, proving that it did order and receive the lettuce.

Based on the above, we conclude that complainant has failed to prove by a preponderance of the evidence that respondent entered into a contract with it for the purchase of 125 cartons of lettuce at a total agreed f.o.b. price of $897.50, and also has failed to prove that respondent received the lettuce. *See PACA Docket No. 4773*, 7 Agric. Dec. 317 (1948). Accordingly, the complaint should be dismissed. *See Great Lakes Packing Co. v. Santa Fe Berry Packers*, 16 Agric. Dec. 818 (1957).

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

SYRACUSE & JENKINS PRODUCE CO., INC. v. TOM LANGE COMPANY, INC.

PACA Docket No. 2-6796.

Ruling issued May 1, 1987.

Ruling issued by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a decision and order was issued on January 12, 1987, awarding reparation to complainant in the amount of $15,105.13, and $3,015.00 for fees and expenses, plus interest. Respondent filed a petition for reconsideration under 7 C.F.R. § 47.24(a), and the decision and order was stayed on February 18, 1987.

In its petition, respondent makes several claims of error. Respondent claims that complainant's witnesses did not give credible testimony as to the terms of the contract, and the decision and order should have upheld respondent's position that payment terms were open, with the payments made by respondent reflecting the agreed upon terms. In the decision and order, we concluded that the evidence supporting the positions of both parties as to the payment terms for nine of the ten loads of corn at issue was insufficient. Therefore, to determine the contract price, we used the market price at the time of delivery for each of these loads. Respondent has not presented a good reason which would lead us to alter this conclusion.

With respect to the Market News Service Reports prices used by the decision and order to determine the applicable market prices, respon-

dent claims that they are inaccurate, implying that they reflect a price for U.S. Fancy grade, which was not the actual grade of the corn shipped. Respondent, however, has failed to provide any evidence that the Market News Service Reports price quotations were for U.S. Fancy grade, and the Reports nowhere indicate that such is the case. We must thus assume that the prices quoted were for corn of generally good merchantable quality and condition, and there is no evidence that the complainant's corn failed to meet this standard.

Respondent also claims that the Market New Service Reports prices should not have been used because they reflect only those prices of corn in less than truck lot or car lot quantities, being sold to a retail store owner by a commission merchant. In this case, claims respondent, where truck lot quantities were being sold to a dealer from a shipper, the actual market prices were lower. Respondent's claim is speculative and unsupported by any evidence in the record. Under the circumstances of this case, the most accurate determination of the contract price was the Market New Service Reports quotations, less freight, as utilized in the decision and order.

Respondent's final argument is that its claim of accord and satisfaction was erroneously rejected. However, respondent does not refer to any evidence that its payment was identified as being payment in full. The decision and order held correctly that the absence of such evidence defeats the claim of accord and satisfaction.

It is our conclusion that respondent's arguments were fully considered in the decision and order, and properly rejected. Therefore, there is no merit to the petition for reconsideration, and it is hereby dismissed. The February 18, 1987, stay order is hereby vacated and the January 12, 1987, decision and order is reinstated. The amount awarded therein as reparation, and additional reparation for fees and expenses, plus interest, shall be paid by respondent to complainant within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

TAM PRODUCE, INC. v. R. V. DISTRIBUTING, INC.

PACA Docket No. 2-6935.

Decision and order issued May 27, 1987.

Breach of warranty proved where evidence disclosed poor physical condition of fresh tomatoes—Shipping costs may not be recovered by purchaser on f.o.b. shipment where there is failure to prove breach of contract by seller—Where no grade specified in contract, standard for damage determination is the tolerance level of lowest grade for fresh tomatoes—Interest not awarded on portion of award granted where seller refused to accept buyer's tender of the exact amount owed.

TAM PRODUCE, INC. v. R. V. DISTRIBUTING, INC.

Reparation was awarded to complainant where respondent accepted f.o.b. shipment of fresh tomatoes and failed to prove decayed condition was caused by seller's breach. Respondent was not permitted to deduct transportation cost of decayed tomatoes from amount paid complainant for remaining undecayed portion of order. Reparation not awarded for f.o.b. shipment of fresh tomatoes on grounds of breach of warranty where inspection disclosed percentage of bruised tomatoes was higher than the tolerance level for lowest grade fresh tomatoes in a no grade contract. Where complainant refused respondent's tender of exact amount owed after bruised tomatoes were disposed of at best price obtainable less transportation cost, this amount was awarded complainant without interest as part of the reparation.

Roberta Swartzendruber, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $12,624.00 in connection with two shipments of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. The amount claimed in the formal complaint does not exceed $15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in this case, as is the Department's report of investigation. In addition, the parties were given an opportunity to submit further evidence by way of verified statements and an opportunity to file briefs. Neither party filed verified statements or a brief.

Findings of Fact

1. Complainant, Tam Produce, Inc., is a corporation whose business address is P. O. Box 21483, Los Angeles, California 90021. At the time of the transactions at issue in this proceeding, complainant was licensed under the Act.

2. Respondent, R. V. Distributing, Inc., is a corporation whose business address is P. O. Box 1728, Nogales, Arizona 85621. At the time of the transactions at issued in this proceeding, respondent was licensed under the Act.

3. On August 10, 1984, in the course of interstate commerce, complainant sold the respondent 396 flats of 5/6 or 4/5 tomatoes for the

agreed price of $14.35 per flat, totaling $5,682.60 for the 396 flats. Also on August 10, 1984, in the course of interstate commerce, complainant sold respondent 320 cartons of 6/7 tomatoes for an agreed price of $10.35 per carton, totaling $3,312.00 for the 320 cartons.

4. The total price for both orders placed on August 10, 1984, was $8,994.60.

5. The two orders were combined and shipped f.o.b. on August 10, 1986, by respondent's shipper from Los Angeles, California. Their destination was Salt Lake City, Utah.

6. Upon arrival f.o.b. at Salt Lake City, respondent accepted the entire shipment.

7. No inspection was made of either the 396 flats or the 320 cartons of tomatoes accepted by the respondent.

8. On August 14, 1984, the respondent ordered the 320 cartons of 6/7 tomatoes dumped since most were in a state of decay.

9. Respondent paid complainant for the 396 flats of tomatoes shipped on August 10, 1984, after deducting $400.00 from its payment for the freight charge the respondent paid on the 320 cartons it ordered dumped. Respondent's check to complainant was $5,282.60

10. On November 6, 1984, in the course of interstate commerce, complainant sold respondent 1,408 cartons of 5/6 tomatoes for the agreed price of $5.00 per carton, totalling $7,040.00 for the 1,408 cartons. Also on on November 6, 1984, in the course of interstate commerce, complainant sold respondent 288 cartons of 6/7 tomatoes for the agreed price of $6.50 per carton, totaling $1,872.00 for 288 cartons.

11. The total price for both orders was $8,912.00.

12. The 1,408 cartons of 5/6 tomatoes and 288 cartons of 6/7 tomatoes were shipped on November 6, 1984, f.o.b. by respondent's shipper from Irvine, California. Their destination was Portland, Oregon.

13. Upon arrival f.o.b. in Portland, respondent accepted the entire shipment.

14. On November 8, 1984, at the time of arrival, a federal inspection was made of these tomatoes at 1:50 p.m. in the respondent's warehouse. The relevant part of the inspection report stated:

> PRODUCTS INSPECTED: TOMATOES in cartons printed "Mag-a-roo, Magarro Farms, Irvine, CA., net wt. 18 lbs. net wt. 28lbs.", and stamped "6x6, 5x6, 5x5."
>
> Inspectors count 297 cartons 6x6 lot/1,408 cartons 5x5, 5x6 lot.
>
> CONDITION OF LOAD: Stacked on pallets at above location.
>
> CONDITION PACK: Fairly tight to tight.
>
> TEMPERATURE PRODUCT: Ranges from 52 to 57°F. in various cartons.

CONDITION: 6x6 lot. Average approximately 95% light red and red. Soft in ¼ of samples none, remaining 4 to 16%, average 5%. No decay. From 8 to 32%, average 21% damage by bruising, scattered throughout pack. 5x5, 5x6, lot. Average approximately 75% light red and red. Soft ranges from 4 to 64%, average 24%. Decay average 1%. From 4 to 20%, average 12% damage by bruising, scattered throughout pack.

15. After being notified of their condition, complainant requested respondent to "work them out." Respondent sold the tomatoes for $1,900.00 and paid a $1,300.00 freight bill owed on the tomatoes out of the amount received from their sale.

16. Respondent sent the complainant a check dated December 13, 1986, for the $600.00 difference between amount realized and the freight bill. Complainant refused to accept the $600.00 and returned the check to respondent on December 17, 1984.

17. The formal complaint was filed April 22, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

In f.o.b. sales such as the ones in the instant case, if the buyer accepts the produce at destination point, the buyer's remedy for a breach of contract is recovery of damages from the seller. *L. Gillarde Co. v. New Deal Produce*, 28 Agric. Dec. 487 (1969). Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Santa Clara Produce v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982).

With respect to the August 10, 1984, shipment, respondent accepted all of the tomatoes. There was no inspection of either the 396 flats or the 320 cartons. The respondent claimed the 320 cartons were "out of grade" and refused to pay complainant for these tomatoes. Further, respondent charged the complainant for the freight charges on these tomatoes.

The respondent has offered scant evidence to support its claim that the grade of tomatoes for these 320 cartons was not in conformity with the contract terms between respondent and complainant. Since its only evidence was an unsworn statement by a company which says it dumped the goods, respondent has failed to carry its burden of proof to establish a breach of the contract's provisions, and is liable for the full contract price for these tomatoes.

With respect to the November 6, 1984, shipment, respondent again accepted all of the tomatoes, and is claiming a breach of contract with respect to size ordered and condition upon arrival of both the 1,408 cartons and the 288 cartons of tomatoes. These tomatoes were federally inspected upon arrival. The inspection disclosed nine more cartons of tomatoes than ordered, and also showed tomatoes of a different size than respondent claims to have ordered. Further, the inspection dis-

closed that one lot of the tomatoes averaged 26% damage by soft and bruising while the other lot averaged 37% damage by soft, decay and bruising. There is no evidence in the record that the contract required delivery of a certain specified grade or grades of tomatoes. However, the percentage of damage by bruising is well above the 15% tolerance level at destination for even the lowest grade (U.S. No. 3) fresh tomatoes set forth in the federal regulations at 7 U.S.C. § 51.1861 (d)(2).

These tomatoes were sold on an f.o.b. basis, and accordingly, the warranty of suitable shipping condition applicable in f.o.b. sales applied to such tomatoes. *See*, 7 C.F.R. § 46.43(j). Such warranty provides, in relevant part, that "if the shipment is handled under normal transportation service and conditions" delivery will be assured "without abnormal deterioration at the contract destination agreed upon between the parties." The warranty is not in effect unless transportation services and conditions are normal, and the burden of proof is upon the receiver who accepts goods to prove both normality of transportation and abnormal deterioration. *Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980), *The Grower–Shipper Potatoe Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

Complainant did not challenge the normality of transportation services and conditions. Therefore, it is assumed to have been normal, particularly in the absence of any evidence to the contrary, and the fact that the percentage of condition defects was very high.

Respondent has shown the complainant breached the suitable shipping condition warranty for those tomatoes shipped November 6, 1984. In respondent's verified answer, it states $1,900.00 was received for the tomatoes. The answer does not contain any evidence to show the details of the sales or any other documentation showing how it arrived at $1,900.00. Under normal circumstances, this alone could not be considered as proof of damages. However, in this proceeding, two factors must be given consideration. First, the condition defects noted on the federal inspection were so excessive (primarily 24% soft) that it is apparent that serious losses were incurred by respondent. Returns of $1,900.00 would not necessarily be abnormal. Second, complainant does not controvert respondent's sworn answer and, therefore, it must be given some weight.

For the above reasons, the $1,900.00 will be accepted as respondent's proof of sales for the November 6, 1984, shipment. Therefore, respondent is entitled to damages for complainant's breach of contract for this shipment. Damages are computed by subtracting the actual sales price realized from the contract price. The contract price was $8,912.00 plus $1,300.00 freight or a total value of $10,212.00. This amount less than the return of $1,900.00, or $8,312.00, is respondent's damages. This amount deducted from the invoice price of

$8,912.00 leaves an amount of $600.00 due complainant for the November 6, 1984, shipment.

In view of the above, and on the basis of all of the evidence in the record, we hold respondent is obligated to the complainant in the amount of $4,312.00. This includes the $3,312.00 contract price for the 320 cartons of tomatoes shipped on August 10, 1984, the $400.00 wrongfully charged the complainant for their shipment and the $600.00 difference between the $1,900.00 realized from the sale of tomatoes shipped on November 6, 1984, and their $1,300.00 freight bill. Respondent's failure to pay complainant $4,312.00 is a violation of section 2 of the Act for which reparation plus interest should be awarded. However, inasmuch as respondent attempted payment of $600.00 on the November 6, 1984, order, which is the exact amount owed, and the amount was refused by complainant, interest shall not be awarded on this amount.

Order

Within thirty (30) days from the date of this order, respondent shall pay complainant $4,312.00 as reparation. Interest at the rate of 13% per annum will be assessed on $3,712.00 ($4,312.00 - $600.00) of the award from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

TERRIFIC TOMATO COMPANY v. ORLANDO TOMATO, INC.
PACA Docket No. 2-7185.
Order issued May 4, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $34,992.00 in connection with four transactions involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent, and a hearing was held on February 3, 1987. By motion filed April 15, 1987, complainant notified the Department that it and respondent had amicably settled this matter. Complainant, in its motion, requested dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOMATOES, INC. v. JAMES CORRADO, INC.
PACA Docket No. 2-7384.
Order issued May 22, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on March 5, 1986, and a formal complaint was filed on July 1, 1986. Complainant seeks to recover $15,746.00 which amount is alleged to be the total purchase price for tomatoes sold to and accepted by respondent on January 20, 1986. Respondent filed an answer to the formal complaint on October 27, 1986, admitting that $8,780.50 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary ... may issue an order directing the respondent to pay the complainant the undisputed amount ... leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $8,780.50. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from March 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act, 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

VEG-A-MIX v. VIC MAHN'S, INC.
PACA Docket No. 2-7437.
Order issued May 1, 1987.

ED. A. & TIMOTHY YAKSITCH, d/b/a MYCO v. TOM LANGE CO., INC.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $17,245.45 in connection with 11 transactions involving the shipment of mixed fruits and vegetables, all being perishable agricultural commodities, in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 25, 1987, complainant notified the Department that it was no longer interested in pursuing its complaint and requested that its complaint filed herein be dismissed.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ED A. YAKSITCH AND TIMOTHY E. YAKSITCH, d/b/a MYCO v. TOM LANGE COMPANY, INC.

PACA Docket No. 2-7443.

Order issued May 12, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $9,591.20 in connection with transactions involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated April 21, 1987, complainant notified the Department that a settlement had been reached. Complainant, in its letter of April 21, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER (Summarized)

ACTION PRODUCE v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-227.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $4,020.70 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

ADOBE PRODUCE DISTRIBUTORS INC. v. MCALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-257.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $8,812.80 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

JAMES S. AGAR AND MARK R. SEITZ d/b/a RANCHO VISTA FARMS v. DIVERSIFIED FOODS, INC.

PACA Docket No. RD-87-261.

Default order issued May 18, 1987.

Respondent was ordered to pay complainant, as reparation, $22,014.63 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

BARRA PRODUCE-BAY TREE PLANTATION v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-226.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $1,102.50 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

BRAVO DISTRIBUTORS INC. v. CLEO OWENS, d/b/a GOLDEN STATE MARKETING.

PACA Docket No. RD-87-246.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $32,036.45 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

J. R. BROOKS & SON INC. v. GORE & FRANK INC.

PACA Docket No. RD-87-251.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $4,328.75 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

E. A. BROWN TOMATOES INC. v. VERASTIQUE PRODUCE INC.

PACA Docket No. RD-87-260.

Default order issued May 18, 1987.

Respondent was ordered to pay complainant, as reparation, $29,923.63 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

BUSHMAN'S INC. v. JOSEPH J. STELLY d/b/a STELLY PRODUCE.

PACA Docket No. RD-87-238.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $8,453.75 plus 13 percent interest thereon per annum from November 1, 1985, until paid.

L. CACHO & SONS FARM v. CAL-MEX DISTRIBUTORS, INC.

PACA Docket No. RD-87-152.

Order issued May 18, 1987.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the rellef requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby accepted for filing.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant along with this order.

CAITO BROTHERS CO. v. SCARPACI PRODUCE COMPANY.
PACA Docket No. RD-87-275.
Default order issued May 20, 1987.

Respondent was ordered to pay complainant, as reparation, $4,932.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

C & C ENTERPRISES INC. v. STAR INC.
PACA Docket No. RD-87-284.
Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $13,710.80 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

CASCADIAN FRUIT SHIPPERS INC. v. WEINSTEIN PRODUCE SALES INC.
PACA Docket No. RD-87-244.
Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $370.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

COLORADO POTATO GROWERS EXCHANGE v. VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS.

PACA Docket No. RD-87-233.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $11,125.25 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

RALPH DAUITO & SONS INC. v. JOE PINTO & SONS INC.

PACA Docket No. RD-87-254.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $2,661.25 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

RALPH DAUITO & SONS INC. v. JOSEPH PINTO, SR. d/b/a EAST COAST PRODUCE.

PACA Docket No. RD-87-271.

Default order issued May 20, 1987.

Respondent was ordered to pay complainant, as reparation, $79,548.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

DELAWARE PRODUCE GROWERS INC. v. JOSEPH PINTO SR. d/b/a EAST COAST PRODUCE.

PACA Docket No. RD-87-282.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $6,819.90 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

HALBERT S. DEUEL, JR. d/b/a DEL RIO ORCHARDS v. EMPIRE PRODUCE.

PACA Docket No. RD-87-245.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $10,308.00 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

AL FINER CO. v. F. BOGON COMPANY.

PACA Docket No. RD-87-250.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $1,717.00 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

FOUR SEASONS PRODUCE INC. v. VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS.

PACA Docket No. RD-87-234.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $1,954.50 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

FRESHCO INCORPORATED v. BOISE FARMERS MARKET INC.

PACA Docket No. RD-87-243.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $24,262.85 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

JOE GENOVA & ASSOCIATES INC. v. ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE.

PACA Docket No. RD-87-286.

Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $19,653.10 plus 13 percent interest thereon per annum from January 1, 1986, until paid.

JEROME GROSSMAN d/b/a JEROME BROKERAGE DIST. CO. a/t/a JEROME'S DIST. CO. v. RICHARD ITULE PRODUCE INC.

PACA Docket No. RD-87-263.

Default order issued May 18, 1987.

Respondent was ordered to pay complainant, as reparation, $50,688.96 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

GROWERS PACKING COMPANY v. FLAMINGO PRODUCE SALES INC.

PACA Docket No. RD-87-253.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $44,240.00 plus 13 percent interest thereon per annum from March 1, 1986, until paid.

HAUN POTATO CO. v. C & W WHOLESALE.

PACA Docket No. RD-87-255.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $1,350.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

HENRY AVOCADO PACKING CORPORATION v. SANTOS PRODUCE CO. INC.

PACA Docket No. RD-87-288.

Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $11,028.00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

HOVERSEN & SONS v. JOSEPH A. CUTTONE, JR. d/b/a JAC PRODUCE.

PACA Docket No. RD-87-278.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $11,085.00 plus 13 percent interest thereon per annum from October 1, 1986, until paid.

LINDEMANN FARMS INC. v. PAT WOMACK INC.

PACA Docket No. RD-87-266.

Default order issued May 19, 1987.

Respondent was ordered to pay complainant, as reparation, $14,846.10 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

LINDY FARMS INC. v. ANTHONY J. MOREALI JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE.

PACA Docket No. RD-87-241.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $4,112.20 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

JOHN LIVACICH PRODUCE INC. a/t/a VISTA SALES v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-229.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $3,263.00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

GERALD LOWRIE d/b/a L & L PACKING CO. OF CALIF. v. DON A. PELUCCA d/b/a DON PELUCCA.

PACA Docket No. RD-87-285.

Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $3,885.00 plus 13 percent interest thereon per annum from November 1, 1985, until paid.

MAGNOLIA FRUIT & PRODUCE CO. INC. v. FRANK S. MEDRANO d/b/a FRANK'S PRODUCE.

PACA Docket No. RD-87-291.

Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $2,573.00 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

J. S. MCMANUS PRODUCE CO. INC. v. B. H. COMPANY INC.

PACA Docket No. RD-87-237.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $2,880.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

M.E.G. DISTRIBUTING INC. v. R & A PRODUCE DIST. CO. INC.

PACA Docket No. RD-87-283.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $6,149.25 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

MENDELSON-ZELLER CO. INC. v. M. L. GALLOWAY INTERNATIONAL INC. a/t/a GALLOWAY FARMS INTERNATIONAL.

PACA Docket No. RD-87-235.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $3,126.25 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

MEREX CORP. v. O. D. SCHUMANN, INC.

PACA Docket No. RD-87-177.

Order issued May 1, 1987.

ORDER [Continuance]

This proceeding was continued until the Department receives proper notification that respondent's proceeding now pending in the United States Bankruptcy Court has been closed or dismissed.

MEREX CORP. v. UNITED FRUIT AND PRODUCE, INC.

PACA Docket No. RD-87-174.

Order issued May 18, 1987.

Order [Continuance]

This proceeding was continued until the Department receives proper notification that respondent's proceeding now pending in the United States Bankruptcy Court has been closed or dismissed, or that the debts have been discharged.

REYNOLD M. METTLER v. CLEO OWENS d/b/a GOLDEN STATE MARKETING.

PACA Docket No. RD-87-247.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $12,646.25 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

ROBERT L. MEYER d/b/a MEYER TOMATOES v. WAYNE EASLEY d/b/a CRAFT TOMATO CO.

PACA Docket No. RD-87-264.

Default order issued May 18, 1987.

Respondent was ordered to pay complainant, as reparation, $9,240.00 plus 13 percent interest thereon per annum from October 1, 1986, until paid.

MONTEREY BAY PACKING CO. v. ANTHONY J. MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE.

PACA Docket No. RD-87-281.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $5,840.25 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

MOUNTAIN PRIDE APPLES INC. v. WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE CO.

PACA Docket No. RD-87-277.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $8,373.60 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

MOUNTAIN VALLEY INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-248.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $682.50 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. v. B & B WHOLESALERS INC. a/t/a PATT WHOLESALE PRODUCE.

PACA Docket No. RD-87-267.

Default order issued May 19, 1987.

Respondent was ordered to pay complainant, as reparation, $3,585.50 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

NAVAJO MARKETING COMPANY v. JOE PINTO & SONS INC.

PACA Docket No. RD-87-280.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $2,538.70 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

MORRIS OKUN INC. v. CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE CO.

PACA Docket No. RD-87-242.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $9,131.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

PANDOL BROS. INC v. PAT WOMACK INC.

PACA Docket No. RD-87-265.

Default order issued May 19, 1987.

Respondent was ordered to pay complainant, as reparation, $17,625.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

PISMO-OCEANO VEGETABLE EXCHANGE v. RUSSO FARMS, INC.

PACA Docket No. RD-87-210.

Default order issued May 22, 1987.

STAY ORDER

The default order previously issued was stayed pending receipt of complainant's answer to respondent's petition to reopen after default.

PURE GOLD INC. v. MCALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-258.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $2,621.25 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

READY PAC PRODUCE INC. v. J. SEGARI CO. INC.

PACA Docket No. RD-87-236.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $7,935.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

RICHARD M. RUIZ d/b/a RUIZ PRODUCE CO. v. BRETT M. WEST d/b/a TRI-CITY PRODUCE.

PACA Docket No. RD-87-259.

Default order issued May 18, 1987.

Respondent was ordered to pay complainant, as reparation, $1,201.00 plus 13 percent interest thereon per annum from April 1, 1986, until paid.

SANTA MARIA SALES INC. v. SAN MIGUEL PRODUCE INC.

PACA Docket No. RD-87-276.

Default order issued May 20, 1987.

Respondent was ordered to pay complainant, as reparation, $395.75 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

H. SCHNELL & COMPANY INC. v. TUNICK PRODUCE CO. INC.

PACA Docket No. RD-87-289.

Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $2,468.50 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

SILVA HARVESTING CO. v. ANTHONY J. MOREALI, JR. d/b/a PACIFIC COAST PRODUCE BROKERAGE.

PACA Docket No. RD-87-270.

Default order issued May 19, 1987.

Respondent was ordered to pay complainant, as reparation, $19,834.90 plus 13 percent interest thereon per annum from December 1, 1985, until paid.

SOUZA BROS. PACKING CO. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-273.

Default order issued May 20, 1987.

Respondent was ordered to pay complainant, as reparation, $800.00 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

SPUD EXPRESS v. JOSEPH PINTO, SR. d/b/a EAST COAST PRODUCE.

PACA Docket No. RD-87-231.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $2,480.00 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

SUNKIST GROWERS INC. v. FRANK MALLAT d/b/a MALLAT FAMILY.

PACA Docket No. RD-87-239.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $1,189.85 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

SUN WORLD INTERNATIONAL INC. a/t/a SUN WORLD v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-225.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $1,589.50 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

SUN WORLD INTERNATIONAL INC. v. MCALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-230.

Default order issued May 5, 1987.

Respondent was ordered to pay complainant, as reparation, $2,211.25 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

TANIMURA AND ANTLE v. SUNCOAST FOODS INC. a/t/a SUNCOAST DISTRIBUTORS.

PACA Docket No. RD-87-279.

Default order issued May 28, 1987.

Respondent was ordered to pay complainant, as reparation, $8,575.50 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

TANITA INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-249.

Default order issued May 13, 1987.

Respondent was ordered to pay complainant, as reparation, $1,988.70 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

TOP DISTRIBUTING CO. v. GOLDEN HARVEST PRODUCE DISTRIBUTORS INC.

PACA Docket No. RD-87-268.

Default order issued May 19, 1987.

Respondent was ordered to pay complainant, as reparation, $11,135.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

VALLEY CENTRAL SALES INC. v. T & L DISTRIBUTORS INC.

PACA Docket No. RD-87-252.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $2,371.50 plus 13 percent interest thereon per annum from June 1, 1986, until paid.

VALLEY CENTRAL SALES INC. v. B. H. COMPANY INC.

PACA Docket No. RD-87-269.

Default order issued May 19, 1987.

Respondent was ordered to pay complainant, as reparation, $6,852.50 plus 13 percent interest thereon per annum from August 1, 1986, until paid.

VEN-CO PRODUCE INC. v. TUNICK PRODUCE CO. INC.

PACA Docket No. RD-87-290.

Default order issued May 29, 1987.

Respondent was ordered to pay complainant, as reparation, $9,497.00 plus 13 percent interest thereon per annum from September 1, 1986, until paid.

VOITA CITRUS INC. v. DIVERSIFIED FOODS INC.

PACA Docket No. RD-87-262.

Default order issued May 18, 1987.

Respondent was ordered to pay complainant, as reparation, $31,094.75 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

J. A. WOOD CO-VISTA INC. d/b/a J. A. WOOD COMPANY v. MCALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-256.

Default order issued May 15, 1987.

Respondent was ordered to pay complainant, as reparation, $6,660.15 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

YAKIMA FRUIT & COLD STORAGE CO. v. J. SEGARI AND CO. INC.

PACA Docket No. RD-87-240.

Default order issued May 7, 1987.

Respondent was ordered to pay complainant, as reparation, $4,876.50 plus 13 percent interest thereon per annum from July 1, 1986, until paid.

ZAMBITO PRODUCE COMPANY INC. v. MELON PRODUCE INC.

PACA Docket No. RD-87-272.

Default order issued May 20, 1987.

Respondent was ordered to pay complainant, as reparation, $1,237.50 plus 13 percent interest thereon per annum from February 1, 1986, until paid.

PLANT QUARANTINE ACT

In re: GENARO RADHAMES MADERA.

P.Q. Docket No. 181.

Order filed May 29, 1987.

Order by Dorothea A. Baker, Administrative Law Judge.

COMPLAINT DISMISSED

Upon Motion therefor, the Complaint filed herein on February 6, 1986, is hereby dismissed.

Copies hereof shall be served upon the parties.

In re: BEVERLY ANN PETERS.

P.Q. Docket No. 227.

Ruling filed May 20, 1987.

Satisfaction of due process requirements, service of complaint on respondent.

The Judicial Officer ruled on a question certified by Judge Weber that due process requirements were satisfied when a copy of a complaint was sent by regular mail to respondent's address after certified mail to the same address was returned marked "UNCLAIMED."

Jaru Ruley, for complainant.

Respondent, pro se.

Question certified by *William J. Weber, Administrative Law Judge.*

Ruling by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On November 19, 1987, Administrative Law Judge William J. Weber (ALJ) certified to the Judicial Officer the question as to whether due process requirements were satisfied by the attempts to make service of the complaint on respondent. The question was referred to the Judicial Officer for decision on May 19, 1987.

The copy of the complaint sent to respondent by certified mail was returned marked "UNCLAIMED." The complaint was then sent by regular mail to the same address, and the regular mail copy was not returned to the Department. Service of the complaint was properly made under the Department's rules of practice (7 C.F.R. § 1.147(b)). This complies with the requirements of due process. *In re Landeen*, 45 Agric. Dec. ____ (Oct. 21, 1986). (Although the facts as to Mr. Landeen's duty to notify the Secretary as to any change of address under the Packers and Stockyards Act were referred to in *Landeen*, those

circumstances were not essential to the decision in that case.) Accordingly, a default decision should be issued in this case. However, the ALJ should permit the parties to file briefs as to whether the amount of the civil penalty requested ($750) is consistent with the sanctions imposed in similar cases (*e.g.*, *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985)), and, if not, the reasons for the change of policy.

Although it is not relevant to the decision in this respect, it is interesting to note that the ALJ's certified question was sent by certified mail to respondent at the same address used in serving the complaint, and the return receipt card bears the signature "Beverly Peters."

CONSENT DECISIONS ISSUED

MAY 1987

(Not published herein.—Editor)

Animal Quarantine and Related Laws

BARRETT, DORIS. A.Q. Docket No. 317. 5/18/87.

DOBSON, JOHNNY, SULPHUR SPRINGS LIVESTOCK COMMISSION COMPANY, O.L. COLLEY LIVESTOCK COMMISSION COMPANY, and GREENVILLE LIVESTOCK COMMISSION COMPANY. A.Q. Docket No. 265. As to Sulphur Springs Livestock Commission Company. 5/15/87. As to Johnny Dobson. 5/27/87.

HILL, LEON, d/b/a GREEN VALLEY DAIRY FARMS. A.Q. Docket No. 156. 5/5/87.

LONG, MICHAEL F. and DWIGHT FRICK. A.Q. Docket No. 266. 5/26/87.

TOM & WENTZ CATTLE COMPANY. A.Q. Docket No. 312. 5/26/87.

Animal Welfare Act

BEAN, ALBERT. AWA Docket No. 381. 5/15/87.

GAYLORD, JOHN d/b/a HOLY ORDER OF MARY. AWA Docket No. 324. 5/27/87.

WINANS, O.V., and ETHEL WINANS. AWA Docket No. 414. 5/29/87.

Egg Research and Consumer Information Act

SHEFFIELD, WYNELLE P. d/b/a SHEFFIELD EGG FARMS. ERCIA Docket No. 7. 5/27/87.

VANDE BUNTE, HOWARD T. d/b/a VANDE BUNTE EGG FARMS. ERCIA Docket No. 10. 5/5/87.

Packers and Stockyards Act

BODEN, VERNON D. P&S Docket No. 6837. 5/1/87.

BRAUN, ALVIN. P&S Docket No. 6867. 5/22/87.

BURDETTE, DOUG. P&S Docket No. 6757. 5/6/87.

FINDLEY, THOMAS L. P&S Docket No. 6768. 5/18/87.

GARDNER, HART and PERRY GARDNER. P&S Docket No. 6800. 5/29/87.

GRAYSON COUNTY STOCKYARD MARKET, INC., RAY MORRISON, JIMMY MORRISON, ROBERT MORRISON and PAUL M. LEWIS. P&S Docket No. 6708. With respect to Paul M. Lewis. 5/27/87.

HARDY LIVESTOCK, INC., CRIS, and A.C. HARDY a/k/a CRIS HARDY. P&S Docket No. 6864. 5/6/87.

LAUER, KEITH E., C. A. LAUER and ROB LAUER. P&S Docket No. 6637. 5/11/87.

LITTLE JOE LIVESTOCK-MEAT, INC. and JOSEPH PAGLIUSO, JR. P&S Docket No. 6812. 5/15/87.

MERGEN, HERBERT. P&S Docket No. 6861. 5/1/87.

Packers and Stockyards Act (cont.)

MORRIS LIVESTOCK EXPRESS, INC., JOSEPH DEVITT and DAVID RORTVEDT. P&S Docket No. 6766. 5/26/87.

NORTH CENTRAL MEATS OF INDIANA, INC. and DOUGLAS W. LINDVALL. P&S Docket No. 6849. 5/15/87.

REED AND SONS, INC., NORVEL, RONALD D. REED, NORVEL T. REED, JR. and RONALD REED II. P&S Docket No. 6874. 5/8/87.

SHOSHONE SALE YARD, INC. and GAILYN PETERSON. P&S Docket No. 6729. 5/28/87.

TANAKA, BEN B. P&S Docket No. 6835. 5/15/87.

TURNER'S LIVESTOCK, INC. P&S Docket No. 6839. 5/5/87.

Plant Quarantine Act

ALLIED AVIATION SERVICES INTERNATIONAL CORPORATION. P.Q. Docket No. 296. 5/6/87.

MEI, KAO CHUNG. P.Q. Docket No. 289. 5/26/87.

YANG MING MARINE LINE